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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Van Brocklin v. *Tennessee*, 117 U.S. 151	63
Vandepitte v. *Preferred Acc. Ins. Co.* [1933], 1 Dom. Law Rep. 289, 291 (Privy Council)	65
Ware v. *Hylton*, 3 Dall. 199	33, 34
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Tariff Act of 1922, 42 Stat. 944:	
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Georgia Code Ann. (Pocket Part), Sec. 3-108	68
Virginia Code (1950), Sec. 55-22	68
Constitution of Austria, Art. 50	50
Constitution of German Federal (Bonn) Republic, Art. 59(2)	50
Constitution of Italy, Art. 80	50
12 Am. Jur., *Contracts*, Sec. 275 (pp. 822-823)	65

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American State Papers, Class I..... 20
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Annals of Congress, 6th Congress, cols. 613-614.... 37
Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series):
pp. 399, 414 39
Barnett, *International Agreements Without the Advice and Consent of the Senate*, 15 Yale L. J. 18, 63 40
Baron de Nolde, *Droit et Technique des Traites de Commerce, Academie de Droit International* (Hague Academy of International Law) *Recueil des Cours* (1924) Vol. II, p. 291..... 52
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Beveridge, *The Life of John Marshall:*
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Borchard, *Executive Agreements and Treaties*, 53 Yale, L. J. pp. 664, 669-670, n. 20, 673-675..... 40
Butler, *The Treaty Making Power of the United States*, Vol. I:
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Corbin, *Contracts*, Vol. IV, Secs. 779c, 830-833, 838-854, Vol. V, Secs. 1020 *ff*	65, 67, 68
Corwin, *The President, Office and Powers* (1940 ed.) 201-213	34
Corwin, *The President—Office and Powers* (1948 ed.), pp. 252 ff.	
Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916), 102	39
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Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417-418	37
2 Curtis, *History of the Constitution of the United States*, 410	35
30 Dept. of State Bulletin:	
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2 Elliott, *Debates*, 454	42
4 Elliott, *Debates*, 277-278, 310	42
Executive Agreements and the Proposed Constitutional Amendment to the Treaty Power, 51 Mich. L. Rev. 1202, 1206-1207	40
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2 Farrand, *Records of the Federal Convention*, 297	36
2 Farrand, *Records of the Federal Convention*, 392	36
2 Farrand, *Records of the Federal Convention*, pp. 297-298, 540-543	43
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4 Farrand, *Records of the Federal Convention*, (Rev. ed., 1937) p. 58 44
Federalist, The, Nos. 64 and 75 36
Federal Rules of Civil Procedure:
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Fleiner-Giacommetti, *Schweizerisches Bundesstaatsrecht*, 825-9 50
Foreign Relations of the United States, 1934:
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Foreign Trade in Agricultural Products, Hearings before the Committee on Agriculture and Forestry, United States Senate, 83d Cong., 1st Sess.:
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Foster, *The Treaty-Making Power under the Constitution*, 11 Yale L.J. 69 39
Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J.:
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Hackworth, *Digest of International Law*, Vol. 5:
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Hearings before the Committee on Finance, U.S. Senate, 81st Cong., 1st Sess., on H.R. 1211:
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Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, etc., House of Representatives, 78th Cong., 2d Sess., on H. J. Res. 6, etc., Serial No. 21, pp. 79-88 44
Helvidius Papers, 1 Madison, *Letters and Writings* 38
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H. Doc. No. 471, 56th Cong., 1st Sess. 53
H. Rep. 166, pp. 14-15, 75th Cong., 1st Sess. (1937) 26
H. Rep. No. 537 (conference rep.), 82d Cong., 1st Sess., p. 4 28

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H. Rep. 1000, p. 9, 73rd Cong., 2d Sess. (1934)	26
H. Rep. 1594, pp. 34-35, 76th Cong., 3d Sess. (1940)	26
H. Rep. No. 2269 (conference rep.), 81st Cong., 2d Sess., p. 5	28
H. Rep. (Conference) No. 1089, 83d Cong., 1st Sess., p. 4	29
Hull-Lothian Agreement	50
Laband, *Staatsrecht des Deutschen Reichs* (5th ed.) Vol. II, pp. 153-155	50
Lapradelle, Emer de Vattel in 3 Vattel, *The Law of Nations* (Carnegie ed.) xxix-xxxx	41
Lauterpacht's Oppengeim *International Law* (7th ed.) Vol. I, Sec. 512	50
Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365	40, 41
Levitan, *The Foreign Relations Power*, 55 Yale L. J. 467	34
Louter, *Le Droit International Public Positif* (1920) Vol. I, p. 512	52
1 Madison, *Letters and Writings, Helvidius Papers*, 614	52
Malloy, Treaties I, pp. 628, 663	53
McClure, *International Executive Agreements*, (1941)	25
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McNair, *The Law of Treaties*, p. 86	50
Memorandum submitted by Attorney General Jackson, Hearings before the Committee on Finance, United States Senate, 76th Cong., 3d Sess., on H. J. Res. 407 (Extension of Reciprocal Trade Agreements Act) p. 732, 86 Cong. Rec. 3677, 3678	22, 23
Miller, *Lectures on the Constitution, Davis' Notes*, 35-37	34

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Moore, Treaties and Executive Agreements, 20 Political Science Quarterly:
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5 Moore, *International Law Digest*, 210-221 39

Nussbaum, *A Concise History of the Law of Nations* (Rev. Ed.) pp. 32, 127, 138, 156, 203 52
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8 Op. A.G. 411, 415 34

39 Op. A.G. 484, 487 ..... 49, 51

Policy of United States Concerning Generalization of Tariff Commission, 12 Department of State Press Release:
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President Grant's Message to Congress of December 5, 1870, Foreign Relations of the United States 1870, pp. 10-13 23

Proclamation of October 5, 1830, 4 Stat. 817 22

Reeves, *The Influence of the Law of Nature upon the International Law of the United States*, 3 American Journal of International Law:
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Restatement of the Law of Conflicts of Laws:
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Restatement of the Law of Contracts:
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Riesenfeld, *International Relations:*
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Sayre, *The Constitutionality of the Trade Agreements Act* (1939):
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39 Col. L. Rev. 770-775 ..... 45, 52

Scott, *Proceedings of the American Society of International Law*, Vol. 28, p. 2 at 8-10 34

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Second Annual Message of President Jackson of December 6, 1830, Register of Debates in Congress, 21st Cong., 2d Sess., Appendix ii, iii, 2 *Richardson, Message and Papers of the Presidents*, 500, 501-504 23
Sen. Doc. No. 170, 82d Cong. 2d Sess. (1953) 40, 45
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Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 2 24
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S. Rep. No. 299, 82d Cong., 1st Sess., p. 7 28
S. Rep. 871, p. 12, 73rd Cong., 2d Sess. 26
S. Rep. No. 1297, p. 5, 76th Cong., 3d Sess. (1940) . 26
S. Rep. No. 1375, 81st Cong., 2d Sess., p. 4 28
Stein, *Einige Bemmerkungen uber das Internationale Verwaltungsrecht*, 6 Schmoller's *Jahrbuch fur Gesetzgebung etc.* (1881), 395, 430 ff 43
Story, *Commentaries on the Constitution*, Sec. 198-217 34
Story, *Commentaries on the Constitution of the United States* (5th ed.), Vol. II, Secs. 1402, 1841. 43, 54
Sutherland, Arthur S., *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 Harv. L.R. 281, pp. 290-291 30
Sutherland, George, *The Powers of the National Government*, S. Doc. No. 417, 61st Cong., 2d Sess., p. 7 35
Arthur E. Sutherland, *Restricting the Treaty Power*, 65 Harv. L. R.:
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George Sutherland, *Constitutional Powers and World Affairs* 34, 49
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ciary, United States Senate 83d Cong., 1st Sess., on S.J. Res. 1 and S.J. Res. 43 28
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Tucker's *Blackstone's Commentaries*, Vol. I, App. pp. 309, 310 (1803) 42, 51

United States Tariff Commission, Reciprocity and Commercial Treaties (1919):
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Vattel, *The Law of Nations* 41
Vol. III, p. 160 42
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Warren, *The Making of the Constitution* (1937 ed.) 33
p. 451 33
pp. 653-658 44

Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 George Washington University Law Review 271 44

Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts,"* 3 University of Chicago L. Rev. 453, 457. 41
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2 Wharton, *Revolutionary Correspondence* 64 42

Williston, *Contracts* (Rev. Ed.):
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Willoughby, *The Constitutional Law of the United States* (2d Ed) Vol. 1, Section 287 45

Wolff, *Jus Gentium*, Sec. 369 (Carnegie ed.) Vol. 2, p. 191 52

Writings of Thomas Jefferson, The, (Memorial ed.) Vol. III, pp. 15, 16 37

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OCTOBER TERM, 1954

No. 14

UNITED STATES OF AMERICA, PETITIONER

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GUY W. CAPPS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia denying defendant's motion to dismiss the complaint (R. 13-16) is reported at 100 F. Supp. 30. The oral opinion of the District Court granting defendant's motion for a directed verdict at the end of the plaintiff's evidence (R. 147-149) has not been reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 164-170) is reported at 204 F. 2d 655.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1953 (R. 170). On July 10, 1953, Mr. Justice Clark extended the time within which the petition for a writ of certiorari might be filed to and including September 12, 1953 (R. 173). The petition for a writ of certiorari was filed on September 10, 1953, and was granted on November 16, 1953 (R. 175). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 22 of the Agricultural Adjustment Act limited the Executive to that Section's specific procedural and substantive remedies against damaging imports of subsidized commodities, and precluded the Executive from exercising his authority to enter into Executive Agreements to attain the same ends as the remedies provided in Section 22.

2. Whether the President has general nonstatutory power to enter into an Executive Agreement with a foreign country in order to aid and implement a Congressional policy regulating commerce.

3. Whether, where the Federal Government as regulator of foreign trade is the beneficiary of a third-party beneficiary contract, judicial enforcement of the promise requires specific Congressional authorization.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution and of the statutes involved are set forth in Appendix A, *infra*, pp. 76-81.

STATEMENT

1. *The Potato Price Support Program and the Executive Agreement between the United States and Canada.* Under Section 1(b) of the Agricultural Act of 1948 (*infra*, pp. 80-81), the United States undertook to support potatoes at 90 per cent of the parity price. This program was carried out by means of contracts in which the United States, acting through the Commodity Credit Corporation, agreed to purchase from eligible growers and dealers all potatoes that could not be sold commercially at 90 per cent of the parity price (R. 164 and 6 C. F. R. (1949 ed.) 648.51-65).[1]

The 1948 potato crop was one of the largest recorded in the United States as well as in the Maritime Provinces of Canada (R. 73). Since the Canadian unsupported price levels were considerably lower than those in the United States,[2] it became profitable to import Canadian potatoes into the United States in spite of custom and freight

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[1] The parity prices varied from State to State and increased from July 1948 to March-April 1949. The lowest parity price was $2.15 for July 1948 in North Dakota and Minnesota, the highest $3.50 for March-April for the mid-Atlantic States. 6 C. F. R. 648.64. See also R. 87-88.

[2] In the instant case, the price per cwt, was $1.82 at Charlottetown, P. E. I., in December 1948 (R. 150-151). Ninety per cent of parity for Maine potatoes at the same time was $2.70 (6 C. F. R. 648.64).

charges.[3] On the other hand, the influx of Canadian potatoes was bound to decrease the quantity of domestic potatoes which could be sold in the open market at 90 per cent of parity, thus materially increasing the cost of the price support program to the Government.

Congress anticipated that imports might interfere substantially with price support programs. Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (*infra*, pp. 76-79), contains a method for dealing with the problem. It provides for a direction by the President to the Tariff Commission to investigate the situation, an investigation by the Tariff Commission after due notice and opportunity for hearing to interested parties, a report by the Tariff Commission containing findings and recommendations, findings of fact by the President on the basis of the report, and finally imposition on the objectionable imports of fees not to exceed 50 per centum *ad valorem* or of quantitative limitations.

Two considerations made it inadvisable to apply Section 22 to the potato situation. While suited to work out a long-range agricultural program, Section 22 was too complicated and slow to cope with the temporary problems caused by the sudden bumper crop of a perishable commodity. In 1948

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[3] Custom duties amounted to $0.75 per cwt. (R. 76), freight from Prince Edward Island to Florida $0.40 per cwt. (R. 77, 158).

the customary time for the Tariff Commission to act was 9-10 months. 94 Cong. 8450.[4] Moreover, it was likely that the imposition of the additional fees or import limitations by unilateral action would result in retaliation by Canada, one of our best customers for fruits and vegetables (R. 143).

In these circumstances, the President did not avail himself of the machinery set forth in Section 22, but rather sought to accomplish the purposes of the Section by a more appropriate method. The mutual problems caused by the large potato surplus were solved, not by independent use of national legislation, but by way of bilateral negotiation between the United States and Canada. In the resulting agreement, signed on November 23, 1948 (R. 152-155), Canada undertook to place potatoes under export control, not to issue licenses for the exportation of the table stock potatoes to the United States, and to grant export licenses for certified seed potatoes to the United States only if the con-

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[4] It was said that there was too little time left before the presidential conventions of 1948 to improve on the procedures of Section 22 (94 Cong. Rec. 8450-8451). See, however, Section 104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, modifying Section 22, to the effect that the President may now take immediate action pending the proceedings before the Tariff Commission. For the legislative history of Section 104, see *infra*, pp. 28-29. Cf. statement of Secretary of Agriculture Benson, on April 9, 1953, before the Senate Committee on Agriculture and Forestry pointing out that experience had proven that the procedure set forth in Section 22 was wholly ineffective to meet the problem and needed strengthening. Foreign Trade in Agricultural Products, Hearings before the Committee on Agriculture and Forestry, United States Senate, 83d Cong., 1st sess., pp. 10, 14.

tract between the Canadian exporter and the United States importer include a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes (R. 153-154).[5]

In exchange, the United States agreed not to impose the quantitative limitations or fees, provided for in Section 22, upon Canadian potatoes of the 1948 crop and, furthermore, gave assurances that certain anticipated potato price support measures of the Canadian Government, necessitated by the limitations on the export of table stock potatoes, would not be considered subsidies within the meaning of Section 303 of the Tariff Act of 1930 (46 Stat. 687, 19 U.S.C. 1303), authorizing the imposition of countervailing duties. The agreement went into effect on November 23, 1948 (R. 152),[6] and came to an end on June 20, 1949 (R. 136). On November 26, 1948, Canada issued an Order in Council subjecting potatoes to export control (R. 98-99).

2. *Respondent's Potato Imports.* In December 1948, respondent, a Virginia corporation which grows and ships potatoes and vegetables on the

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[5] The importation of seed potatoes was permitted in view of the traditional limited use of Canadian seed potatoes by some growers on the Atlantic seaboard (R. 112-113). There is no generic difference between seed and table stock potatoes; the former are of somewhat higher grade (R. 81.) Seed potatoes, therefore, can be sold for table purposes. (R. 51, 63, 81-82.)

[6] According to R. 136, it went into effect on December 1, 1948.

eastern seaboard of the United States (R. 1, 4, 150, 151, 158), purchased approximately 50,000 100-pound bags [7] of potatoes from a Canadian exporter, H. B. Willis (R. 13, 150-151). In view of the requirement of the Executive Agreement and of the Canadian Order in Council that the American importer give assurances that the potatoes would be used for seed purposes only and not diverted or reconverted for table stock purposes (*supra*, pp. 5-6), respondent wired Willis on December 27, 1948 (R. 18, 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia.[8]

Actually, only one-fifth of the potatoes were of a type suitable for planting in Florida (R. 100-101).

The S. S. *Gangway,* on which the potatoes were loaded, left Canada during the last days of December 1948 (R. 18) and arrived off Jacksonville, Florida, on January 9, 1949 (R. 18). On January 11, 1949, respondent sold all but 10,000 bags of the potatoes, without restrictions as to the disposition

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[7] Potatoes are commonly sold in 100-pound bags (R. 109).

[8] Respondent was well aware of the purpose and implications of this telegram. When questioned by the U. S. Department of Agriculture about a statement allegedly made by respondent that it had special permission to sell seed potatoes for edible use (R. 101-102), it denied having made such statement (R. 103) and added (R. 104):

> I realize fully the agreement with Canada, its intent and want to and expect to cooperate with the program. I am only bringing in seed [potatoes] for seed purposes * * *.

The Court of Appeals found that respondent's officers knew of the Executive Agreement and its requirements (R. 165).

of the potatoes (R. 60, 151, 165), to the Atlantic Commission Company (R. 151), a fruit and vegetable buying subsidiary of the Great Atlantic and Pacific Tea Company (R. 41).[9] The Atlantic Commission Company resold some 13,600 bags to the A. & P., the rest to a number of fruit and vegetable wholesale dealers located in Florida, Georgia, and Alabama (R. 47-48, 159-161).[10] The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22-38, 165), and that four-fifths of the potatoes remained in Florida.[11]

This venture, made possible by respondent's misrepresentations to the Canadian and United States authorities, turned out to be highly profitable. The potatoes bought, per invoice dated January 4, 1949, at $88,350.08 (R. 150-151) were resold January 11 for $162,622.40 (R. 151). Taking into account the freight charges of $19,417.60 (R. 158) and the customs duties of approximately $37,000,[12] respondent was able to make within a week a profit of approximately $18,000 or 20 per cent, while sad-

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[9] The Great Atlantic and Pacific Tea Co. is essentially a retail grocery organization (R. 41).

[10] Atlantic Commission Co. resold to respondent 10,000 bags of potatoes at $3.65 per bag (R. 44-45, 151). Respondent disposed of these potatoes at prices ranging from $3.75 to $4.00 (R. 65-66; Exh. 4, R. 152).

Of the 48,553 bags of potatoes originally purchased by it, Atlantic Commission Co. resold 10,000 to respondent, as just stated, and sold 13,627 to the A. & P. (R. 159) and 24,926 (34,926 less 10,000 to respondent) to various wholesalers (R. 160-161).

[11] 36,728 bags (R. 159-161).

[12] $0.75 per cwt. (See *supra*, fn. 3, p. 4.)

dling the United States with the virtually certain liability of having to purchase almost 50,000 additional bags of potatoes at an average price of $3.00.[13]

3. *The Proceedings Below.* On January 17, 1951, the United States brought this suit in the District Court. Its complaint was based essentially on the theory that the clause "certified seed potatoes * * * are for planting in Florida and Georgia," contained in the contract between respondent and the Canadian exporter (*supra*, p. 7) constituted a promise for the benefit of the United States, that respondent had breached this contract, and that as a result of this breach the United States was compelled to purchase 48,544 additional bags of potatoes under the Agricultural Act of 1948 at a net cost of $150,486.[14] The complaint asked for $150,486 in damages (R. 1-4).

The District Court sustained the complaint against a motion to dismiss (R. 13-16), holding that respondent had made a promise to use the potatoes for seed only and that the United States was the beneficiary of this undertaking (R. 15-16). However, at the trial, the District Court directed a verdict in favor of respondent at the conclusion of the Government's case (R. 147-149) on the grounds

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[13] See *supra*, fns. 1, 2, 10, 11, pp. 3, 8.

[14] This sum is based not on the support price paid by the United States for 48,544 bags of potatoes but on the net costs to the United States (cf. R. 90-92). For an alternative method of computing the damages based upon the farm support price of potatoes in the Jacksonville area, cf. R. 86-88, 157.

that respondent had not breached its agreement and that the Government had not shown any damages.

The Court of Appeals affirmed the decision of the District Court but on other grounds (R. 164-170). It concurred in the finding of the District Court that the telegram stating that the potatoes were for planting consummated a contract designed to benefit the United States (R. 166, 169). Disagreeing with the District Court, the Court of Appeals had "little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from breach" (R. 166).[15] It sustained the decision of the District Court because it considered the contract unenforceable for two reasons. First, it held that the contract merely sought to carry out the Executive Agreement and that the Agreement was void because (a) the President lacked the power to enter into the Executive Agreement since he had not been granted specific authority either by the Constitution or by Congress (R. 166-169), and (b) the President could not avoid compliance with the specific statutory procedure, provided by Congress in Section 22 of the Agricultural Adjustment Act, through the expedient of entering into an Executive

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[15] The court found that "there is evidence from which the jury could properly have drawn the conclusion that they were sold on the market as food displacing potatoes grown in this country and causing damage to the United States by requiring greater purchases of American grown potatoes in aid of the price support program than would have been necessary in the absence of their importation" (R. 165-166).

Agreement. Second, the court held that it could not give effect to the contract unless Congress had expressly authorized a suit by the Government for damages as a method of enforcing "what is essentially a breach of a trade regulation" (R. 166, 167-170).

SUMMARY OF ARGUMENT

This case presents two different types of problems. The first and major one is whether the Potato Executive Agreement of November 23, 1948—the ultimate basis of the Government's claim—is valid. The Court of Appeals held that it was not. The second problem is whether, granting the validity of the Agreement, the United States may recover for a breach of contract. The Court of Appeals held that respondent's promise to abide by the Agreement is not enforceable by the Government without specific statutory authorization. Connected with the second question are some subsidiary issues decided in the Government's favor in the court below, *i.e.*, whether respondent made a promise enforceable under the law of third-party beneficiary contracts, whether this promise was breached, and whether the United States suffered any damages from the breach.

I

The President had full authority to enter into the Potato Agreement with Canada.

A. The main ground of the adverse holding below appears to be that the Agreement conflicted

with the Agricultural Adjustment Act, Section 22 of which provides an administrative procedure for dealing with imports interfering with the price support program. The fact is, however, that there is not only no conflict between the Agreement and the statutory purposes and objectives but that the statute envisages, and gives legislative sanction to, the making of the Agreement.

1. The most effective means of dealing with imports which interfere with a domestic program is through bilateral negotiation rather than unilateral imposition of import restrictions. This has long been recognized by both Congress and the Executive and, accordingly, for about seventy-five years it has been understood that unilateral powers such as those granted in Section 22 do not preempt the field; on the contrary, these powers are designed to strengthen the President's ability to negotiate by giving him a statutory—but not exclusive—internal remedy if diplomacy fails. For instance, although the Tariff Act of 1890 provided special unilateral powers to restrict imports and did not refer to executive arrangements, the President concluded some twelve reciprocal trade agreements with the same objectives as the Act; Congress later indicated approval of this course. The practice has been similar with respect to several later statutes authorizing restrictive measures.

2. Congress was aware of this history, and enacted Section 22 in its light. Moreover, the Section's post-legislative history, including subsequent

amendments, indicates that Congress did not disapprove of the Potato Agreement after it had been brought to its attention.

3. Furthermore, Section 22 authorized, by clear implication, the making of this type of arrangement. Subsection (f) expressly provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" (emphasis added). This plainly envisaged future agreements other than treaties, and even agreements in *conflict* with the policy of Section 22. Certainly, the provision also sanctioned agreements designed to carry out the spirit and objectives of the statute.

4. It is not denied, either by respondent or the court below, that the Potato Agreement furthered the congressional policy of Section 22. The President adopted this advice, sanctioned and contemplated by Congress, because otherwise there would have been no effective method of fulfilling the legislative purpose and preventing an unwarranted drain on the Treasury, in the emergency circumstances then prevailing.

B. Apart from Section 22, the President has general non-statutory power to consummate an executive arrangement like the Potato Agreement.

1. Under the Constitution, the country possesses all the normal powers of a sovereign nation, and the Federal Government has all such powers incident to external sovereignty—not merely those dele-

gated to it in terms. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304.

2. In the conduct of foreign relations, the President's role is major, as has been recognized from the beginning. He is the instrument of the United States in international affairs, except where the Constitution provides otherwise, and is charged (in John Marshall's words) "with the whole foreign intercourse of the nation".

3. The treaty clause of the Constitution provides for Senate participation where treaties are involved, but the United States can consummate agreements which are not treaties in the Constitutional sense and do not require Senate action. The text of the Constitution (Art. I, Sec. 10, pars. 1-3) indicates that the framers were well aware of the distinction between formal treaties and international arrangements of a lesser order. And the making of such agreements, in proper cases, has been recognized as valid by Congress since 1792, has been continuously done since the early days of the Republic, and has had the approval of this Court. Some of these arrangements have rested on specific presidential powers, such as those he has as Commander-in-Chief, but many agreements of varied types have been based on the President's general power in the field of foreign relations. Long continued usage thus combines with the words of the Constitution and the accepted theory of the Federal Government's powers to sanction executive agreements in appropriate instances. Like

treaties, such Presidential agreements can, of course, be modified or rescinded (for domestic purposes) by later legislation or treaties.

4. The Potato Agreement plainly falls within the class of executive agreements which the President can make without Senate participation. It is a typical minor non-political arrangement, limited in scope and duration, made with a neighboring nation, and involving few, if any, commitments on the part of this country. Our history shows that comparable agreements have often been cast into this form, particularly with Canada. See also *supra*, p. 12.

The power of Congress to enact commercial legislation, under the commerce clause, does not prevent the President from making such an arrangement as the Potato Agreement, under his authority to conduct foreign affairs. As the history of treaty-making shows, Congressional power to legislate on certain matters does not automatically exclude those subjects from the reach of the foreign relations power. Especially where aliens are involved, legislative power is normally limited to American territory and the foreign relations power—whether exercised through treaty or Presidential agreement—is therefore coordinate and concurrent when the field is one such as foreign commerce. The concurrent nature of these powers has long been recognized in practice, as well as by this Court. See, *e.g.*, *Chicago and Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103.

II

The United States is a third party beneficiary of the contract, made under the Potato Agreement by respondent and the Canadian exporter, and may recover the damages it suffered as a result of the breach of this contract.

A. Respondent's promise to use the potatoes only for planting in Florida and Georgia is enforceable by the United States without express statutory authorization. No such statute is required to give effect to a promise running to the benefit of the United States, at least where an accepted type of transaction or liability is involved. *Dugan* v. *United States*, 3 Wheat. 172; *Cotton* v. *United States*, 11 How. 229. The enforcement of respondent's third-party beneficiary contract would merely carry out a traditional liability; it would not create a new one by way of analogy. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, and *United States* v. *Gilman*, 347 U. S. 501, are therefore not applicable.

B. 1. Respondent's promise for the benefit of the United States as a third party is governed by federal law, which gives effect to contracts for the benefit of third parties. The same result would follow under the law of any State or Canadian province which could be said to govern the enforceability of respondent's promise. Moreover, the United States is a direct and not merely an incidental beneficiary.

2. The Court of Appeals properly held that the United States had made out a case for the jury on the issue of whether there had been a breach of contract. Respondent violated its undertaking "not to divert or reconsign" the seed potatoes "for table stock purposes" by selling them without any restrictions as to their use. The mere designation "seed potatoes" did not constitute any protection for the United States, since seed potatoes are table potatoes of a superior type and respondent's purchasers were essentially in the grocery—not the seed potato—business.

The court below was also correct in holding that damage had been sufficiently proved. The Government's evidence indicated that it clearly had been injured; at least 25,500 bags of potatoes not suitable for planting in Florida remained in that State and were in all probability used for table purposes, thus displacing American grown table potatoes and increasing the financial burden of the potato price support program. The "fact of injury" has been established, and it was competent for the jury to determine its extent. Respondent may not be permitted to escape responsibility because the damages can be proved only by way of approximation.

ARGUMENT

I

The President Had Authority to Enter into the Potato Agreement with Canada

The primary basis of the judgment below is that the President was without authority to conclude

the Potato Agreement with Canada. The Court of Appeals' initial reason for this ruling seems to be that the President cannot, without Congressional authorization, consummate an international agreement regulating foreign commerce, because that field is reserved by the Constitution to Congress or to the making of a formal treaty (R. 166-167). The second ground relied upon to invalidate the Executive Agreement is that its making was essentially in conflict with the statutory procedure prescribed in Section 22 of the Agricultural Adjustment Act which established an elaborate administrative procedure for dealing with imports interfering with the price support program (R. 168). Our position on the first ruling is that, even though Congress has power under the Constitution to regulate foreign commerce, the President has the constitutional authority, as the Nation's instrument in the conduct of foreign affairs, to execute an agreement with a foreign country by which that nation agrees to restrict exports to the United States. On the second branch of the holding, our view is that the agreement, far from conflicting with either the spirit or the terms of the Agricultural Adjustment Act, is fully consonant with its purpose and provisions and, indeed, is envisioned and even sanctioned by the statute.

We deal first with the second branch of the holding since it appears to have been the main reliance of the court below. Only if the Court rejects our argument on that point will there be occasion to

consider the broader question of the power of the President to act where Congress has not spoken.

A. *The Potato Agreement is sanctioned by the Agricultural Adjustment Act and conflicts with no statute.*

Though it indicates that the Potato Agreement would be unauthorized even in the absence of the statute, the court below seems ultimately to have placed its decision that the Agreement is invalid on the assumption that it conflicted with Section 22 of the Agricultural Adjustment Act (R. 166-168). The court construed that section as establishing an elaborate and exclusive method of procedure in dealing with imports which interfered with the price support program (*supra*, pp. 10-11), and held that the President could not "avoid" compliance with these procedural requirements by recourse to his foreign relations power (R. 168). The fact is, however, that there is not only no conflict between the Agreement and the purposes and objectives of the statute but that the statute envisages, and gives legislative sanction to, the making of the Agreement.[16]

1. In enacting Section 22 of the Agricultural Adjustment Act Congress did not intend to preempt the field to the exclusion of the exercise of

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[16] For this reason, it is unnecessary, as not being a part of this case, to discuss either the extent to which the Congress can limit the exercise of the President's foreign relations power, or the authority of the President to make agreements inconsistent with a pre-existing statute or treaty.

the foreign relations power. Section 22 deals with a problem frequently recurring in international relations. A foreign state may discriminate against the United States or flood our country with imports to the extent of undermining our economy, or its imports may interfere with legislative programs, as in this case. There are two basic methods by which to cope with such disturbances: a diplomatic settlement through bilateral negotiation, or the invocation of unilateral measures, such as reciprocating discrimination or the imposition of burdens on imports like additional duties, import quotas, or even complete embargoes. The former method has been utilized by the President under his foreign relations powers; the latter often requires an act of Congress.[17]

The court below assumed that these two methods of dealing with the problem are mutually exclusive —that the specification by Congress of a particular procedure leading to unilateral action [18] made that method the exclusive one for settling the international problem and automatically terminated the Executive's power to adjust the dispute by negotiation. This interpretation of legislation such as Section 22 is unrealistic because it defeats its

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[17] Cf. the discussion between Senator Millikin and Mr. Brown, Director of the Office of International Trade Policy, Department of State, on the extension of the Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st sess., on H. R. 1211, p. 844. See also *American State Papers*, Class I, Vol. 5, pp. 1-2.

[18] These powers are basically limited to the territorial limits of the United States; see *infra*, p. 55.

own purpose, and also conflicts with the well established understanding of both Congress and the President that such a statute is intended to supplement, not to supplant, the President's foreign relations powers.

If the purpose of retaliatory legislation in the field of foreign commerce were limited to actual punishment, it would in most cases be doomed to failure, since the other country is usually able to impose equally onerous counter-reprisals.[19] Thus employed, retaliation would normally lead to the deterioration of foreign relations in geometric progression. For this reason it has long been realized that the real function of this type of statute is to induce the other country to desist from its objectionable activities. As early as 1820, it was said in *The Francis and Eliza,* 108 Fed. 541, 545-546 (E.D. La.), reversed on other grounds, 8 Wheat. 458:

> Before we proceed to the examination of the merits of this case, it is proper to observe that the law upon which the libel is founded is a retaliatory law. It is intended to produce a great political effect; one of much importance to the trade and navigation of the United States. It is calculated so to operate upon Great Britain as to induce her to relax from her strict and rigid exclusion of American com-

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[19] Cf. R. 143, and Senator Tydings' pertinent remarks at 79 Cong. Rec. 11503.

> merce and navigation from her ports on this continent and in the West Indies. * * *
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>
> We here plainly discover that the policy of Great Britain is to secure to herself the monopoly of trade and navigation of her colonies. The policy of the United States, in passing this law, is no less obvious. It is to cut off and prevent all communication between the colonies of Great Britain and the United States until she shall consent to a mutual intercourse.[20]

This goal of amicable adjustment cannot ordinarily be achieved by two independent legislatures without channels of communication, but only by way of negotiation between the branches of the governments which are equipped to deal directly with each other.[21] It has been understood by the

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[20] The statute involved was the Act of April 18, 1818, 3 Stat. 432, closing all ports of the United States to British vessels coming from ports closed to American vessels. For the diplomatic negotiations to reach a mutually satisfactory solution of the problem, cf. *American State Papers*, Class I, Vol. 5, pp. 81-90; *ibid.* Vol. 6, pp. 963-985. See also fn. 21, *infra*.

[21] Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320, and *infra*, p. 36; and see Memorandum submitted by Attorney General (now Mr. Justice) Jackson, Hearings before the Committee on Finance, United States Senate, 76th Cong., 3d Sess. on H. J. Res. 407 (Extension of Reciprocal Trade Agreements Act) p. 732, 86 Cong. Rec. 3677, 3678.

It is noteworthy that the Acts of May 6, 1822, 3 Stat. 681, and May 29, 1830, 4 Stat. 419, authorized the President to lift the restrictions of the Act of April 18, 1818, *supra*, fn. 20, if he should receive satisfactory evidence that Great Britain would open her ports in the West Indies to American vessels. The settlement of this dispute with Great Britain (cf. Proclamation of October 5, 1830, 4 Stat. 817) was achieved not by a treaty but by way of informal agreement. Second Annual

Congress and by the Executive for at least three-quarters of a century that retaliatory powers are granted to the President primarily in order to strengthen his position at the conference table[22] and that their actual use is to be secondary, only after attempts at amicable settlement have failed.[23] Similarly, statutory provisions like Section 22 cannot be read as indicating an intent to preempt the field to the exclusion of the foreign relations power.[24]

Section 3 of the Tariff Act of 1890, 26 Stat. 612, is the leading instance of retaliatory legislation

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Message of President Jackson of December 6, 1830, Register of Debates in Congress, 21st Cong. 2d Sess., Appendix ii, iii, 2 Richardson, *Messages and Papers of the Presidents*, 500, 501-504; see also *American State Papers*, Class I, Vol. 6, pp. 963-988, and Memorandum submitted by Attorney General Jackson, *supra*, pp. 731-733, 86 Cong. Rec. 3678.

[22] See, *e. g.*, President Grant's Message to Congress of December 5, 1870, *Foreign Relations of the United States*, 1870, pp. 10-13, in which he asked for legislation authorizing him to terminate certain Canadian transit privileges should Canada "repeat their unneighborly acts against our fishermen." The import of this request was not to limit the President's choice of remedies to the termination of these privileges but to improve the chances of a favorable outcome of the negotiations.

Cf. President Theodore Roosevelt's advice to talk softly while carrying a big stick.

[23] See, *e.g.*, the imposition of penalty duties under Section 3 of the Tariff Act of 1890 (*infra*, pp. 23-25) "on Colombia, Venezuela and Haiti, after these States had been asked to negotiate and had failed satisfactorily to respond." U. S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919) p. 27.

[24] Diplomatic negotiations can often be far more effective than unilateral action, since the former can operate prospectively and thus prevent the occurrence of the disturbance. The statutory remedy, on the other hand, usually becomes operative only after the interference with our interests has actually taken place. This is another reason why it is extremely un-

which served as the basis for the conclusion of executive agreements in the commercial field.[25] This provision, held constitutional in *Field* v. *Clark*, 143 U.S. 649, 680-691, authorized the President, if he found that a country imposed unequal or unreasonable duties upon certain articles imported from the United States, to suspend the duty-free importation of those goods from such a country into the United States.[26] Although Section 3 made no reference to the conclusion of agreements, it was utilized as the bargaining basis for at least twelve reciprocal trade agreements with the same objectives as the Section (Sen. Exec. Doc. 119, 52d Cong., 1st sess., p. 2). Subsequent congressional discussion disclosed that both political parties fully approved of this use of the President's foreign relations power (26 Cong. Rec. 6981-7000). It was even suggested on the floor of the Senate that the grant to the President of retaliatory powers in Section 3 carried with it direct authority to eliminate discrimination by way of negotiation (26 Cong. Rec. 6991).[27] And Section 71 of the Tariff

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likely that such a statute seeks to prohibit preventive negotiations.

[25] Though the proposition can hardly be denied, we show below in some detail (*infra*, pp. 31-57) that, in proper cases, the President may enter into executive agreements, and that treaties made with Senate participation are not the only arrangements this country may make with foreign nations.

[26] A similar retaliatory clause was found in Section 5 of the Meat Inspection Act of 1890, 26 Stat. 414, 415.

[27] While at least one Senator disagreed with this broad interpretation of the clause (26 Cong. Rec. 6991), no one suggested that the grant of retaliatory powers negatived the power to negotiate Executive Agreements. It should be noted that

Act of 1894 (28 Stat. 569), which repealed Section 3 of the Tariff Act of 1890, contained an express provision saving the reciprocal arrangements entered into under Section 3. The practice with respect to several later statutes authorizing restrictive measures has been similar; executive agreements have often been made, both under and apart from specific authorization, in order to effectuate the general statutory policy. See McClure, *International Executive Agreements* (1941), pp. 84-92, 173-189, and Appendix B, *infra*, pp. 81-97.[28]

This Court, too, has recognized in general terms that legislation enacted "for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people" (*Field* v. *Clark*, 143 U.S. 649, 691) is not intended

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Congress had refused to include in the Tariff Act of 1890 a provision expressly authorizing the making of reciprocal trade agreements (cf. statement of Senator Gray at 26 Cong. Rec. 6987; U. S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919) 27, 145-150).

[28] Examples of these statutes are: Tariff Act of 1909, Section 2, 36 Stat. 82; Tariff Act of 1922, Section 317, 42 Stat. 944; Tariff Act of 1930, Section 338, 46 Stat. 704, 19 U. S. C. 1338. The latter provision is still in effect. Under the Reciprocal Trade Agreements Act (48 Stat. 943, 19 U. S. C. 1351-1354), the power of retaliation has also been utilized as a basis for negotiations rather than for unilateral action. Cf. *Policy of United States Concerning Generalization of Tariff Concessions*, 12 Department of State Press Release 212, 214, 219. The Anti-dumping Act of 1921, 42 Stat. 11, 19 U. S. C. 160-171, and Section 303 of the Tariff Act of 1930, 46 Stat. 687, 19 U. S. C. 1303, raise similar problems. See also 19 U. S. C. 130, 131, 46 U. S. C. 141, 142 (tonnage duties).

In Appendix B, *infra*, pp. 81-97, we set forth a study on executive agreements which differ in their terms from legislation on foreign commerce.

to be a restrictive and binding mandate, limiting methods of redress to the specific means enumerated in the statute. On the contrary, it has pointed out that these statutes are intended to confide to the President additional "large discretion" (*Field* v. *Clark,* 143 U.S. 649, 691), and "an authority which was cognate to the conduct by him of the foreign relations of the Government". *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 422; *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 327. This attitude is particularly pertinent to legislation like Section 22, the purpose of which was and is to prevent imports from interfering with various types of domestic agricultural programs.

2. Against this background, Section 22 of the Agricultural Adjustment Act [29] cannot properly be read as providing for an exclusive method of limiting exports interfering with the price support program, or as curtailing the powers the President otherwise might have had under his foreign relations powers.[30] Moreover, the particular legisla-

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[29] Section 22 was originally inserted into the Agricultural Adjustment Act by Section 31 of the Act of August 28, 1935, 49 Stat. 773.

[30] The reports submitted to Congress in connection with the Reciprocal Trade Agreements Act of 1934 and its extensions disclose that Congress has been fully aware of the interpretation of Section 3 of the Tariff Act of 1890, discussed above. See *e.g.*, H. Rep. 1000, p. 9, 73rd Cong., 2d Sess. (1934); S. Rep. 871, p. 12, 73rd Cong., 2d Sess.; H. Rep. 166, pp. 14-15, 75th Cong., 1st Sess. (1937); Sen. Rep. No. 111, pp. 19-20, 75th Cong., 1st Sess. (1937); H. Rep. 1594, pp. 34-35, 76th Cong., 3d Sess. (1940); S. Rep. No. 1297, p. 5, 76th Cong., 3d Sess. (1940).

tive and post-legislative history of Section 22 discloses that Congress realized fully that its effect would be to enhance and strengthen, rather than to curb, the President's foreign relations power and that the President's action to prevent the interference of imports with the operation of the price suppo. . program would not be limited to the measures enumerated in the Act but might take the form of agreements with foreign countries. During the discussion which preceded the enactment of Section 22, Congress was informed (79 Cong. Rec. 11503) that the President had utilized the analogous provision of Section 3(e) of the National Industrial Recovery Act as the basis of negotiations under which Japan (as did Canada in the instant case) agreed to limit its export of pencils to the United States (see *Foreign Relations of the United States,* 1934, Vol. III, pp. 801-805).[31]

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[31] The possible argument that Section 22 is couched in mandatory language ("the President shall") and, hence, that the President has to follow the statutory procedure once its conditions have been met, and is not at liberty to follow another method of reaching the same result, is in conflict with the legislative history of Section 22 [cf. 79 Cong. Rec. 9591-9592 (rejection of amendment to make Section 22 mandatory); 79 Cong. Rec. 11497-11512, 11521-11526 (constant reference to intent to delegate discretionary powers to President); see also 99 Cong. Rec. 7876, 7881, 7906-7907], and with practice under it (30 Dept. of State Bulletin 385). Moreover, the mandatory language of subsection (b) becomes operative only in the event of a formal report by the Tariff Commission, and no such report had been requested or submitted with respect to potatoes in 1948.

The post-legislative history of Section 22 similarly indicates that Congress did not believe that that provision denied to the President the use of his foreign relations powers to bring about the objectives of the Agricultural Adjustment Act. The text of the Potato Agreement was promptly released to the press,[32] and it was discussed with a Congressional Committee as early as February 1949.[33] In the following two years, Congress twice amended Section 22 (Acts of June 28, 1950, Section 3, 64 Stat. 261, and June 16, 1951, Section 8(b), 65 Stat. 75),[34] so as to limit the President's power to enter into agreements *inconsistent* with the policy of the Act. The amendatory acts contain nothing indicating a congressional purpose that the President should carry out the policy of the Act only by unilaterally imposing import restrictions and not by diplomatic means; there was no opposition whatever to agreements consonant with the legislative goal.

The Potato Agreement was again brought to congressional attention on April 6, 1953.[35] Section

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[32] Dept. of State Press Release 954, Nov. 26, 1948; see also 19 Dept. of State Bulletin 744.

[33] Extension of Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st sess., pp. 898-899, 918-920 (February 24, 1949).

[34] See S. Rep. No. 1375, 81st Cong., 2d sess., p. 4; H. Rep. No. 2269 (conference report), 81st Cong., 2d sess., p. 5; S. Rep. No. 299, 82d Cong., 1st sess., p. 7; H. Rep. No. 537 (conference report), 82d Cong., 1st sess., p. 4.

[35] Treaties and Executive Agreements, Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st sess., on S. J. Res. 1 and S. J. Res. 43, p. 838. The decision below, which received considerable publicity, was issued nine days thereafter.

104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, amending Section 22(b) (*supra*, p. 5), was enacted four months later. Neither this statute nor the detailed debate in the Senate which discussed the means of improving the efficiency of Section 22 give the slightest reason to believe that Congress considered the Potato Agreement an invasion of its prerogatives or a violation of the statute.[36]

3. We can go further than the argument that Congress did not seek either to curb the President's power or to make the procedure of imposing unilateral import restrictions the exclusive one. For Section 22, as it stood on November 23, 1948 (when the Potato Agreement was concluded), by clear implication authorized the making of this type of arrangement. Subsection (f) (*infra*, p. 79) expressly provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" [emphasis added]. By these words the subsection plainly contemplated that "international agreements" other than treaties—i.e., executive agreements—could and would be "hereafter" made in the field to which Section 22 relates. More than that, Congress assumed that the President had authority to negotiate agreements *in conflict* with the policy of Section 22 and

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[36] 99 Cong. Rec. 7876-7883, 7902-7912; see also H. Rep. (Conference) No. 1089, 83d Cong., 1st Sess., p. 4.

specifically declared that such contravening agreements would take precedence over the statutory policy. It would be incongruous, to say the least, to suppose that Congress recognized the President's authority to depart from the policy of Section 22 by way of Executive Agreement but denied him the use of that method when he sought to carry out the spirit and purpose of the statute. Section 22(f), therefore, can and should be read as legislative authorization for precisely the kind of agreement which is under attack here. No one denies the power of Congress to grant such authority or the competence of the President to take action under it.[37]

4. In its detail and as a whole, this history indicates that Congress did not intend to preempt the field when it enacted Section 22 of the Agricultural Adjustment Act and that the unilateral methods provided for in Section 22, exposing the United States to possible retaliation, were not believed to preclude the Executive from making such agreements with foreign nations as would be mutually satisfactory as well as harmonious with the aims of the statute. Indeed, Section 22(f), *supra*, p. 29, shows that arrangements like the Potato Agreement were sanctioned by the Congress in advance.

The Potato Agreement was not merely compatible with the policy and objective of Section 22, *i.e.*, to curtail imports interfering with the price sup-

[37] See Arthur S. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 Harv. L. Rev. 281, 290-291.

port program. The Agreement actively furthered that Congressional policy by making sure that Canadian potatoes would not come into this country under conditions and in quantities which would tend to render ineffective, or interfere with, the potato subsidy program. Neither respondent nor the court below has denied that this is so, or suggested otherwise. The simple fact is that if it were not for the Potato Agreement, the legislative goal would have been seriously obstructed during the 1948-1949 season by a flood of Canadian potatoes. The unilateral mechanism of Section 22 was far too cumbersome and slow to meet the then existing need for quick action (*supra*, pp. 4-5), and the President adopted the traditional instrument of the executive agreement as the most appropriate mechanism for fulfilling the purposes of Congress's agricultural program in the emergency circumstances before him. Only in that way was it practicable to prevent the jeopardizing of the Congressionally authorized potato program and the consequent drain upon the federal treasury through the importation of excessively large foreign supplies into the American market to share in the benefits of the support program.

B. *The President has general power to enter into Executive Agreements of the type of the Potato Agreement*

Because the initial portion of the Court of Appeal's opinion seems to make such a radical departure from the accepted doctrine of the Presi-

dent's role in the conduct of the country's foreign affairs, we feel it appropriate to cover once again some well-trodden ground, in a return to certain of the fundamentals of our constitutional system.

The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country. *Infra*, pp. 30-35. These foreign affairs powers have been mainly entrusted to the President who is the country's organ in its relations with other nations. *Infra*, pp. 35-39. The Treaty Clause of the Constitution (Article II, Section 2) provides for Senate participation where a treaty is involved, but the United States can consummate agreements which are not treaties in the Constitutional sense and do not require Senate action, and the President has authority to make such arrangements acting alone. *Infra*, pp. 39-49. Lesser commercial or trade understandings like the Potato Agreement have long been regarded as appropriate for an executive agreement. *Infra*, pp. 50-54. And it is also settled that where there is Presidential power to take action in the conduct of international relations, the existence of general authority of Congress under the Constitution in the same field—*e.g.*, foreign commerce—does not preclude foreign affairs action by the Executive. *Infra*, pp. 54-57.

1. *The plenary foreign relations power of the United States.*—It is often said that under our

Constitution the "federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted" (see *e.g., United States* v. *Butler*, 297 U.S. 1, 63). But, as the Court has pointed out repeatedly, care must be taken to limit this characterization of our national government to its proper province, *i.e.*, the field of internal affairs (*Carter* v. *Carter Coal Co.*, 298 U.S. 238, 295; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-318; and *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, concurring opinions of Justices Frankfurter and Jackson at 610, and 635-636, fn. 2). For it is the basis of our constitutional plan that we are several as to all domestic matters—except so far as authority has been expressly delegated to the Federal Government—and one as to all foreign affairs.[38]

Accordingly, this Court indicated from the very outset that the Federal Government had all the rights of external sovereignty—not merely those expressly delegated to it in the Constitution. Cf. *Penhallow* v. *Doane*, 3 Dall. 54, 80-81, 92-96; *Ware* v. *Hylton*, 3 Dall. 199, 232. Despite some dispute as to the source of the full rights of external sovereignty

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[38] Cf. Thomas Jefferson's letters of August 14, 1787, to George Washington and Joseph Jones quoted in Warren, *The Making of the Constitution* (1937 ed.) 451; and see the concurring opinion of Mr. Justice Frankfurter in *United States* v. *Pink*, 315 U. S. 203, 242: "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."

held by the national government,[39] there is agreement that under our constitutional plan full sovereignty in external affairs is vested in the Federal Government and that the country possesses all the normal powers of a sovereign nation. See Corwin, *The President, Office and Powers* (1948 ed.) pp. 209-213. The Court has consistently held that this country is "invested with power over all the foreign relations of the country" (*Knox* v. *Lee*, 12 Wall. 457, 555, Bradley, J., concurring) or "with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

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[39] Some have believed that external sovereignty passed directly from the British crown to the Continental Congress and from it, through the Confederation, to the present United States, and was never possessed by the several States. See Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 232. The famous holdings of Mr. Justice Paterson in *Penhallow v. Doane*, 3 Dall. 54, 80-81, and of Chief Justice Jay in *Chisholm* v. *Georgia*, 2 Dall. 419, 470-471, place the same interpretation on the historic events leading to the formation of the Union. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316-317. To the same effect, see Story, *Commentaries on the Constitution* (5th ed.), Secs. 198-217, especially Sec. 216; Miller, *Lectures on the Constitution, Davis' Notes*, 35-37; Butler, *The Treaty Making Power of the United States*, Vol. I, Secs. 22-36; 143-162; George Sutherland, *Constitutional Power and World Affairs*, 37-38, 44-45, 116-118.

On the other hand, Mr. Justice Iredell felt, in *Penhallow* v. *Doane*, 3 Dall. 54, 92-96, that external sovereignty was originally held by the States, which irrevocably transferred all of its incidents to the nation. To the same effect see *e.g.*, Attorney General Cushing, 8 Op. Atty. Gen. 411, 415, and James Brown Scott, *Proceedings of the American Society of International Law*, Vol. 28, p. 2, at 8-10; Levitan, *The Foreign Relations Power*, 55 Yale L. J. 467.

Fong Yue Ting v. *United States*, 149 U.S. 698, 711; see also *Burnet* v. *Brooks*, 288 U.S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; and *Mackenzie* v. *Hare*, 239 U.S. 299, 311.[40] The contents and scope of the nation's foreign relations power have been largely developed from the rules of international law concerning sovereignty, rather than found in any specific constitutional grant. *Jones* v. *United States*, 137 U.S. 202, 212; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707-711; Cf. *Mackenzie* v. *Hare*, 239 U.S. 299, 311.[41]

2. *The President's role in the conduct of foreign affairs.*—The first draft of the Constitution, submitted by Mr. Pinckney on May 29, 1787, followed the example of Art. IX of the Articles of Confederation. It placed the foreign relations powers in the Senate[42] by giving it the "sole and exclusive power * * * to make treaties and to appoint Ambassadors" (Art. VII), while reserving to the President merely the ceremonial function of "receiv-

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[40] As stated by the late Mr. Justice (then Senator) Sutherland: "The sovereign will of the Nation is embodied in the Constitution and its exercise by the government is measured thereby; but in the one case [internal affairs] it is manifested by what that instrument affirms and in the other case [external affairs] by what it fails to negative." George Sutherland, *Constitutional Powers and World Affairs* (1919), 47. See also *Chae Chan Ping* v. *United States* (*The Chinese Exclusion Case*), 130 U. S. 581, 604.

[41] Cf. George Sutherland, *The Powers of the National Government*, Sen. Doc. No. 417, 61st Cong., 2d Sess., p. 7.

[42] 2 Curtis, *History of the Constitution of the United States*, 410.

[ing] public Ministers from foreign nations" (Art. VIII).[43]

Further reflection, however, convinced the members of the Constitutional Convention that the transaction of foreign relations, especially in view of its need for speed and secrecy, was essentially an executive function, to be subject to Senatorial control in those instances where the gravity of possible commitments made such checks desirable.[44] As early as June 18, 1787, Alexander Hamilton submitted a constitutional sketch which shifted the power to make treaties and to appoint ambassadors to the President, under Senatorial control.[45] On August 15, Mr. Mercer declared that the Senate ought not to have the treaty making power, since it was an executive function.[46] A week later, on August 23, James Madison remarked that the President should take part in the making of treaties, since the Senate represented the States alone.[47]

Viewed against this background, the final constitutional text discloses a deliberate design to place the foreign relations power in the President, subject to the controls expressly provided for. This is the way the Constitution was understood almost from the beginning. On April 24, 1790, Thomas

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[43] 3 Farrand, *Records of the Federal Convention*, 599.

[44] *The Federalist*, Nos. 64 and 75; Mr. Davie's Speech in the North Carolina Convention, 3 Farrand, *Records of the Federal Convention*, 347-399.

[45] 1 Farrand, *Records of the Federal Convention*, 292; see also 3 Farrand, *ibid.*, 619, 624-625.

[46] 2 Farrand, *ibid.*, 297.

[47] 2 Farrand, *ibid.*, 392.

Jefferson, then Secretary of State, gave the following official opinion:

> * * * The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[48]

Ten years later, on March 7, 1800, during the debate involving the extradition of Jonathan Robbins, John Marshall stated in the House of Representatives, of which he was then a member:

> * * * The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. * * *
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> * * * * *
>
> The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.
>
> The department which is entrusted with the whole foreign intercourse of the nation * * *.[49]

It is noteworthy that this statement, limited to the conduct of *foreign affairs,* did not arouse antagonism such as that brought on by Hamilton's assertion in the Pacificus papers that the President

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[48] *The Writings of Thomas Jefferson* (Memorial ed.) Vol. III, pp. 15, 16. See also the similar remarks of Madison in the House of Representatives, *Annals of Congress*, 1st Congress, cols. 463-464, 496, and Crosskey, *Politics and the Constitution of the United States*, Vol. 1, pp. 417-418.

[49] *Annals of Congress*, 6th Congress, cols. 613-614.

had all the *executive* powers.[50] On the contrary, it persuaded a large portion of the Republican opposition and secured the support of the administration, and obtained a vote of 61 to 35 in a House almost evenly divided on a party basis.[51] See also the Report of the Senate Committee on Foreign Relations, of February 15, 1816, partially quoted in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319.

It is unnecessary to recall in detail that the Court has repeatedly reaffirmed, in recent years, the conceptions underlying Jefferson's and Marshall's declarations. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. * * * the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-320. See also *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, 315 U. S. 203, 222-223, 229-230;

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[50] Cf. the *Helvidius Papers*, 1 Madison, *Letters and Writings* 607-654.

[51] Beveridge, *The Life of John Marshall*, Vol. 2, pp. 473-475. The shrinkage of the Senate's role in the negotiation of treaties, in which it has an express place under the Constitution, has often been told. See Corwin, *The President—Office and Powers* (1948 ed.), pp. 253 ff.

Chicago & Southern Air Lines v. *Waterman Corp.*, 333 U. S. 103, 109; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; cf. *Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres S. A.*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

3. *The Treaty Clause and executive agreements.* Under Article II, Section 2, of the Constitution, the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

"Treaties," however, are not the only means by which international transactions are conducted. Diplomatic practice recognizes a number of other less formal arrangements, such as *modi vivendi*, exchanges of notes, and other executive agreements -- "a bargain between independent states which is something less than a treaty"[52]—without which, in the words of John Bassett Moore, "current diplomatic business could not be carried on."[53] As a sov-

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[52] Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399, 414.

[53] Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 389.

On executive agreements, see, generally, Hackworth, *Digest of International Law*, Vol. 5, pp. 392-397; 5 Moore, *International Law Digest*, 210-221; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), 102; Baldwin, *The United States as a Great Power*, 9 Yale Review (Old Series) 399; Foster, *The Treaty-Making Power under the Constitution*, 11 Yale L. J. 69; Barnett, *International Agreements without the*

ereign nation, the United States has, and must have, the capacity to enter into these lesser agreements (*supra*, pp. 32-35). Since the President is the nation's instrument in external affairs (*supra*, pp. 35-39), his is the department empowered to make such agreements, unless the Constitution provides otherwise in the Treaty Clause. But that carefully drawn clause does not stand in the way. Its terms and history, as well as the practice of a century and a half and the decisions of this Court, show that the formal treaty, consented to by the Senate, is not the only mechanism the United States can employ to attain international agreement.

a. In the vocabulary of the members of the Constitutional Convention, the term "treaty" did not cover every type of arrangement with a foreign nation. The very text of the Constitution proves this. Art. I, Sec. 10, carefully distinguishes between a "Treaty, Alliance and Confederation" which the States are absolutely prohibited from entering, and an "Agreement or Compact with an-

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Advice and Consent of the Senate, 15 Yale L. J. 18, 63; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; *Riesenfeld, International Relations*, 25 Cal. L. Rev. 643, 670-672; Borchard, *Executive Agreements and Treaties*, 53 Yale L. J. 664, 669-670, n. 20, 673-675; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206-1207; Treaties and Executive Agreements, Hear ings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., on S. J. Res. 1, etc., pp. 837, 853-861; Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States—Analysis and Interpretation*, edited by Edward S. Corwin, pp. 433 ff.; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

other State, or with a foreign Power" which the States can make only with the consent of Congress. The draftsmen of the Constitution obviously made a distinction between treaties and compacts;[54] and since the records of debates of the Convention are silent on this point, the terms "treaty" and "agreement" or "compact" must have had distinct connotations to the meticulous members of the Convention.[55] Apparently, they were aware of the distinction made between treaties and less formal agreements in contemporary international law as evidenced by the writings of Vattel, whose teachings exerted a profound influence upon American statesmen and lawyers during the revolutionary period and virtually the first hundred years of the Republic.[56]

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[54] *Cf.* Taney, C. J., in *Holmes* v. *Jennison*, 14 Pet. 540, 571-572 (on the Compact Clause): "But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

[55] Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?,"* 3 University of Chicago L. Rev. 453, 457.

[56] Nussbaum, *A Concise History of the Law of Nations*, (Rev. Ed.) 161, 162; Butler, *The Treaty Making Power of the United States*, Vol. I, Sec. 152; Weinfeld, *ibid.*, at 458 *ff.* Lapradelle, Emer de Vattel in 3 Vattel, *The Law of Nations* (Carnegie ed.) xxix-xxxx. Levitan, *Executive Agreements*, 35 Ill. Law Review 365, 366-370. Thus, when the publisher of Vattel's *Laws of Nations* sent Benjamin Franklin three copies of the book in 1775, Franklin answered: "I am much

Vattel distinguishes between treaties which are "entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time," and "agreements, conventions [or] arrangements" "which have for the object matters of temporary interest."[57] It is significant that two of the earliest interpretations of the Compact Clause refer to these portions of Vattel in order to explain the distinction between "treaties" and "agreements" or compacts.[58]

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obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations." 2 Wharton, *Revolutionary Correspondence*, 64. Vattel was cited in the first reported decision of a federal court, *The Resolution*, 2 Dall. 1, 15 (Federal Court of Appeals) (1781), and by both sides in *Respublica* v. *De Longchamps*, 1 Dall. 110, 112 (Oyer & Terminer, Philadelphia, 1784). James Wilson "esteemed as the most learned lawyer of his generation" (Reeves, *The Influence of the Law of Nature upon the International Law of the United States*, 3 Am. Jour. of Int. Law, 546, 552-553), was counsel in both cases. And see his reference to Vattel in the Pennsylvania Convention called to ratify the Federal Constitution, 2 Elliott, *Debates*, 454; Vattel was also cited to the South Carolina Convention. 4 Elliott, *Debates*, 277-278, 310. The first draft of the Constitution which distinguished between Treaties and Agreements was written in Wilson's handwriting. 2 Farrand, *Records of the Federal Convention* 163, 169.

[57] Vattel, *The Law of Nations* (Carnegie ed.), Vol. III, p. 160; Weinfeld, *ibid.*, at 460.

[58] Tucker's Blackstone's Commentaries, Vol. I, App. pp. 309, 310 (1803) and Chief Justice Taney in *Holmes* v. *Jennison*, 14 Pet. 540, 572. Mr. Tucker, a contemporary of the members of the Constitutional Convention (Weinfeld, *ibid.*, at 461), paraphrased Vattel in defining treaties as referring to "subjects of great national magnitude and importance * * * often perpetual or made for a considerable period of time." Mr. Justice Story, while feeling that this formula was at best a very loose

From Vattel and like publicists, the framers of the Constitution must have known that, in international usage, the term "treaty" does not cover all agreements with foreign nations. And by limiting the requirements of senatorial advice and consent to "treaties,"[59] they left undisturbed the power of the President, as the Nation's sole organ in the field of foreign relations, to enter into agreements of lesser importance, shorter duration, or different character.[60]

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and unsatisfactory exposition (2 Story, *Commentaries on the Constitution of the United States*, Section 1402), suggested that the term "treaties" applied to "treaties of a political character," while "compacts and agreements" "might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land, situated in the territory of each other; and other internal regulations for the mutual comfort and convenience of states, bordering on each other" (*ibid.*, Section 1403). Compare the concept of International Administrative Law coined by L. v. Stein, *Einige Bemerkunken uber das Internationale Verwaltungsrecht*, 6 Schmoller's *Jahrbuch fur Gesetzgebung etc.* (1881), 395, 430 *ff.* While Vattel's formulation of the distinction between treaties and other agreements may have been imperfect and groping, it evidences the recognition, by the middle of the 18th century that a new, a non-political type of international arrangement had come into being (see *infra*, p. 52, fn. 77).

[59] It will be noted that Hamilton's draft constitution (*supra*, p. 36) required senatorial advice and consent for "all treaties, conventions and *agreements*," 3 Farrand, *Records of the Federal Convention*, 624-625 (emphasis added).

[60] The records of the Constitutional Convention indicate that when its members were referring to "treaties" they were thinking primarily of peace treaties and other treaties vitally affecting the fundamental interests of the Nation or of the States, such as their territorial integrity, or fishing and navigation rights, which were all-important in the 18th century. Farrand, *Records of the Federal Convention*, Vol. II, pp. 297-

b. Congress and the Executive have recognized since the earliest days of the Republic that the foreign relations of the United States are not to be conducted exclusively by treaty. As early as 1792, the Post Office Act authorized the Postmaster General to "make arrangements with postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."[61] These were not treaties in the constitutional sense. If they had been, Congressional authorization would be of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present.

Ever since the first decade under the Constitution, the President has entered into a large number of executive agreements, many with and many without the consent of Congress.[62] Those made without legislative consent or authorization have been of several types and with many nations. They

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298, 540-543, Vol. IV (Rev. ed., 1937) p. 58; see also the informative letter of Mr. Williamson to James Madison, *ibid.*, Vol. III, pp. 306-307; Warren, *The Making of the Constitution*, pp. 653-658; Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 George Washington University Law Review 271, and Mr. Warren's testimony in Hearings before Subcommittee No. 3 of the Committee on the Judiciary, etc., House of Representatives, 78th Cong., 2d Sess., on H. J. Res. 6, etc., Serial No. 21, pp. 79-88.

[61] Sec. 26, 1 Stat. 232, 239. The Congressional debate discloses that the Second Congress was in no mood to enhance the power of the Executive. Cf. *Annals of Congress*, 2d Congress, cols. 230-236, 238-241.

[62] For their description and enumeration, see the authorities cited fn. 53, pp. 39-40, *supra*. Moore's 1905 article is the early classic in this field.

have covered many subjects, from the most trivial matters of diplomatic ceremony to more important arrangements of commercial or military consequence. "Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, 'the mere private rights of sovereignty.'" [63] There have also been understandings as to the passage of troops, and commercial matters, including arrangements as to imports and exports and customs reciprocity.[64] For example, the 1907 "Gentlemen's Agreement" with Japan, pursuant to which Japan agreed not to issue any passports to its citizens for immigration to the United States, was a Presidential arrangement. Cf. Willoughby, *The Constitutional Law of the United States* (2d ed.) Vol. I. Section 287.

Many of these agreements may be said to have some sanction in powers expressly conferred on the President by the Constitution, such as his power as Commander-in-Chief [65] or his authority to re-

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[63] Sen. Doc. No. 170, 82d Cong., 2d Sess. (1953), *The Constitution of the United States of America—Analysis and Interpretation*, edited by Edward S. Corwin, at p. 433, see also fn. 58, *supra*, pp. 42-43.

[64] See *supra*, pp. 23-25, and Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Col. L. Rev. 751, especially the Appendix at 770-775.

[65] *E.g.* Armistices and other military arrangements; *cf.* Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 390-392; Crandall, *Treaties, Their Making and Enforcement* (2d ed.), Sec. 56.

ceive foreign ambassadors.[66] However, a large and extremely important portion of them such as certain types of commercial agreements, boundary arrangements, and the settlement of claims,[67] do not find any express basis in the Constitution and rest exclusively on the President's general power over foreign relations. And even those agreements which can be tied to a specific executive power find their main support in the President's position as the country's representative in foreign affairs. For instance, the Litvinov Assignment, with its significant debt arrangement, does not stand simply on the constitutional provision that the President "shall receive Ambassadors and other public Ministers" (Art. II, Sec. 3). See *United States* v. *Pink*, 315 U.S. 203, 229-230, 240. The historical fact is that the President's general foreign affairs power, rather than some special or limited provision of the Constitution, supplies an important basis

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[66] *Cf.* The Litvinov Assignment, the validity of which was upheld in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203.

[67] In *United States* v. *Pink*, 315 U. S. 203, 240, the concurring opinion of Mr. Justice Frankfurter stated: "That the President's control of foreign relations includes the settlement of claims is indisputable. * * * The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia." See also *Monaco* v. *Mississippi*, 292 U. S. 313, 331; Moore, *Treaties and Executive Agreements*, 20 Political Science Quarterly 385, 403-408.

for many arrangements he has made in the last century and a half.[68]

There thus exists a usage, going back to the earliest years of the country, that not all the dealings of the United States with foreign nations have to take the form of treaties and that the President may enter into many types of arrangements in his capacity as the sole organ of the Nation in the field of foreign relations. This constitutional usage, on the basis of which the United States has entered into many scores of Presidential agreements, is indicative of the scope of the President's power. *Ex parte Quirin*, 317 U.S. 1, 42; *Inland Waterways* v. *Young*, 309 U.S. 517; *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473; *Field* v. *Clark*, 143 U.S. 649, 691. No one, we believe, can review this history, studded as it is with the continued use of executive agreements of many kinds, without concluding that the Court of Appeals' summary disposal of Presidential power wholly ignores our constitutional history.

c. Though this Court has not often had the opportunity to consider executive agreements, it has affirmatively held that the category of "treaty" does not exhaust our arrangements with foreign powers and that the President may conclude executive agreements which are not treaties. In *Altman & Co.* v. *United States*, 224 U.S. 583, 601, the Court

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[68] Others, of course, are based upon specific authorizations to the Executive contained in statutes, *e.g.*, tariff concession agreements are authorized by Section 350 of the Tariff Act of 1930, as amended, 19 U. S. C. 1351.

confirmed the existence of agreements not "possessing the dignity of one requiring ratification by the Senate." In *Monaco* v. *Mississippi*, 292 U.S. 313, 331, it pointed out that the adjustment of claims need not necessarily take the form of treaties. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318, unequivocally stated that the foreign relations power of the United States included the authority "to make such international agreements as do not constitute treaties in the constitutional sense." *United States* v. *Belmont*, 301 U.S. 324, 330-331, and *United States* v. *Pink*, 315 U.S. 203, 229-230, likewise upheld the President's power to enter into executive agreements without senatorial participation.[69]

Specifically, an executive agreement entered into by the President pursuant to statutory authority has been held by this Court to have the same status as a treaty for the purpose of applying legislation relating to appeals to this Court (*Altman & Co.* v. *United States*, 224 U.S. 583), and it has been held that the President had power to make, without statutory authorization or Senate participation, the Litvinov Assignment incident to the recognition of the Soviet Union. *United States* v. *Belmont*, 301 U.S. 324, 331-332; *United States* v. *Pink*, 315 U.S. 203, 230.

As in the case of treaties, executive agreements can be modified or overridden, for domestic purposes, by subsequent legislation. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 720; *Maser* v. *United*

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[69] See also *Ozanic* v. *United States*, 188 F. 2d 228, 231 (C. A. 2); *Etlimar S. A.* v. *United States*, 123 Ct. Cls. 552, 572.

States, 341 U.S. 41, 45. And like all other governmental power in the United States, this "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * * must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320. Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution [70] which protect all Americans from the excesses of official authority.[71]

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[70] In *United States* v. *Belmont*, 301 U. S. 321, 332, and *United States* v. *Pink*, 315 U. S. 203, 226, the Court assumed that an executive agreement may not violate the Fifth Amendment.

[71] Past practice indicates that international agreements have been cast in the form of treaties or executive agreements, depending upon a number of variables, such as their importance, duration, subject matter, and the degree to which the United States enters into binding commitments. (See 39 Op. A. G. 484, 487). Like most decisions on the distribution of functions between branches of government, the determination of the matters appropriate for an executive agreement calls for informed "political judgment" and does not lend itself to an exact formula. Cf. George Sutherland, *Constitutional Powers and World Affairs*, 121; Arthur E. Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305, 1324, 1329, and the authorities there cited. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, fn. 37, point out that the classification of treaties and compacts under Art. I, Section 3, of the Constitution is based at least in part upon "political judgment." As former Assistant Secretary of State Sayre has said (Sayre, *The Constitutionality of the Trade Agreements Act*, (1939), 39 Col. L. Rev. 751, 755):

> International agreements involving political issues or changes of national policy and those involving interna-

4. *Import restriction agreements like the Potato Agreement.*—Section 22 of the Agricultural Adjustment Act aside, the President clearly has authority to make a commercial arrangement of the type of the Potato Agreement.[72]

a. The fundamental part of the Potato Agreement, the restriction on the movement of potatoes from Canada to the United States in order to prevent interference with the agricultural program in force at that time in this country, was to be enforced primarily by Canada, through its control of one-year's potato crop.[73] In connection with this

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tional arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

Foreign countries seem to apply similar tests. Lauterpacht's Oppenheim, *International Law* (7th ed.) Vol. I, Sec. 512; McNair, *The Law of Treaties*, p. 86; Laband, *Staatsrecht des Deutschen Reichs* (5th ed.) Vol. II, pp. 153-155. Art. 59(2) of the Constitution of German Federal (Bonn) Republic expressly provides for "administrative" agreements (Verwaltungsabkommen). The Austrian and Italian Constitutions (Arts. 50 and 80, respectively) require legislative consent to treaties which are of a political nature. The Swiss practice is strikingly similar to the American. See Fleiner-Giacommetti, *Schweizerisches Bundesstaatsrecht*, 825-9.

[72] In this part of the brief, we discuss the validity of the agreement largely as if Congress had not enacted Section 22 as part of the agricultural support programs, and had not concerned itself at all with imports likely to interfere with, or disrupt, such program. We have already discussed the relationship of the Potato Agreement to Section 22, *supra*, at pp. 19-31.

[73] The agreement took effect on November 23, 1948; it was terminated on June 20, 1949 (R. 136).

undertaking by Canada, the United States gave assurances that it would not impose any quantitative limitations or fees on Canadian potatoes of that crop, and that a certain type of Canadian price support system would not lead to the imposition of a countervailing duty by the United States.[74] This is not an agreement of such duration and "national importance" [75] as to be thought to require senatorial advice and consent. On the contrary, it is the typical minor arrangement [76] which should not be required to take up the limited time of the Senate. It may be of interest that the first example historically given by Wolff in 1749 for informal agreements between nations involves a situation akin to the instant one—an arrangement between two states in which

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[74] The commitment not to impose any quantitative restrictions and fees on Canadian potatoes was purely nominal, because Section 22 of the Agricultural Adjustment Act would not come into play in view of Canada's export limitations, and could not, in any case, be employed because of the time required to bring such United States restrictions into operation. *Supra*, pp. 4-5, 31. Moreover, sub-section (f) of Section 22, as it was then worded, would have prevented the invocation of the Section in a manner contrary to the Agreement. See *supra*, pp. 29-30. The provision not to invoke countervailing duties merely represented an interpretation of Section 303 of the Tariff Act of 1930 as not covering the type of payments involved under the specified Canadian price support system.

[75] Cf. Tucker's *Blackstone's Commentaries*, Vol. I, App. 309-310, fn. 58, *supra*, p. 42.

[76] The agreement certainly was microscopic as compared to the Hull-Lothian agreement, discussed in 39 Op. Atty. Gen. 484, and the "Gentlemen's Agreement" on immigration with Japan, *supra*, p. 45.

> * * * one nation permits another, on account of the high price of grain, to purchase in its territory.[77]

The making of Presidential agreements of this kind also has the support of domestic history. General commercial arrangements by the President go back to the early 19th Century. See Sayre, *op. cit.* fn. 71, *supra,* at pp. 770-771. For well over sixty years there have been agreements specifically dealing on a reciprocal basis with certain matters relating to imports, duties, and customs procedures. *Supra,* pp. 23-25, and Appendix B, *infra,* pp. 81-97. This has been a well-marked area in which Presidents have not hesitated to make international commitments.

In addition, it is significant that instances of co-

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[77] Wolff, *Jus Gentium,* Sec. 369 (Carnegie ed.) Vol. 2, p. 191. We do not know whether and to what extent Wolff's writings were known in this country at the time of the Constitutional Convention. Madison refers to him in 1793 in the *Helvidius Papers, 1 Madison, Letters and Writings,* 614. And it was Vattel's avowed purpose to popularize the ideas of Wolff which led him to write his book on the Law of Nations (*supra,* pp. 41-43). See Vattel, *Law of Nations* (Carnegie ed.) Vol. 3, pp. vii-ix and 6a-10a, and Nussbaum, *A Concise History of the Law of Nations* (Rev. Ed.) 156.

That the present-day distinction between treaties and lesser agreements cannot be traced beyond Wolff and Vattel, who wrote in the middle of the 18th century, is probably due to the fact that nonpolitical arrangements were comparatively rare prior to that period. Nussbaum, *Concise History of the Law of Nations* (Rev. Ed.) 32, 127, 138, 203; Louter, *Le Droit International Public Positif* (1920), Vol. I, p. 512; Baron de Nolde, *Droit et Technique des Traites de Commerce, Academie de Droit International* (Hague Academy of International Law) *Recueil des Cours* (1924) Vol. II, pp. 291, 299-313.

operation and adjustment between neighboring states in nonpolitical matters are typical in the use of the compact device.[78] The first Postal Agreement under the Post Office Act of 1792 [79] was concluded with Canada [80] and the Report of Secretary of State John W. Foster to President Harrison [81] shows the extent to which our neighborly relations with that country have been carried out by informal agreement. The most famous incidents are the Rush-Bagot Agreement of 1817, limiting naval armaments in the Great Lakes, which was submitted to the Senate merely out of "abundant caution", almost a year after its terms actually had been carried out,[82] and the cession to the United States in 1850 of Horse Shoe Reef in the Niagara River.[83]

Taking into account the short term of the agreement, its limited scope, past practice in this field of commercial understandings, and the circumstance that the agreement constitutes an attempt to adjust an economic, nonpolitical problem with a neighboring country, we submit that it falls far short of the important longer-term political arrangements

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[78] Cf. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 694, 695-708, 717-718.

[79] *Supra*, p. 44.

[80] McClure, *Executive Agreements*, 39.

[81] Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., especially 11, 13-14; see also H. Doc. No. 471, 56th Cong., 1st Sess.

[82] Malloy, Treaties I, p. 628; Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., p. 11; McClure, *Executive Agreements*, 31.

[83] Malloy, Treaties I, p. 663; Sen. Ex. Doc. No. 9, 52d Cong., 2d Sess., pp. 13-14; McClure, *Executive Agreements*, 70-71.

which, as "treaties", involve the participation of the Senate.

b. The Commerce Clause does not prevent the President from entering into an arrangement like the Potato Agreement. The court below apparently felt (R. 167-168) that the President was without authority because, under Art. I, Section 8, par. 3, of the Constitution, the field of foreign commerce is within the jurisdiction of Congress. But there is no principle of constitutional law that the power of Congress to legislate on certain matters under the Constitution excludes those subjects from the reach of the foreign relations power. No one would deny that this is true where a treaty is involved (see e.g., *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659).[84] From the beginning, treaties have dealt with matters—including foreign commerce, navigation, tariffs, immigration—on which Congress may and does legislate; the foreign relations power would be virtually nonexistent if it were barred from all those areas in which Congress can and does act. As Mr. Justice Sutherland said in his *Constitutional Powers and World Affairs*, at 150: "But the mere fact that Congress is authorized to legislate upon a particular subject does not, in my judgment, remove it from the jurisdiction of the treaty-making power * * *".

Presidential authority to conclude agreements is as integral a part of the foreign relation power

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[84] The argument was rejected as early as 1796. Story, *Commentaries on the Constitution of the United States* (5th ed.) Vol. II, Sec. 1841.

as is treaty-making (*supra*, p. 35 ff.). Congressional authority is normally limited to American territory where aliens are involved,[85] and this geographical limitation is one of the important reasons for the existence of the foreign relations power. As the Court said in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318:

> * * * Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.

The foreign relations power—whether exercised through treaty or through Presidential agreement—is therefore a necessary concomitant of Congressional power under our constitutional system. In reality, when the subject matter is in a field such as "foreign commerce," the two powers, executive and legislative, are coordinate and concurrent.[86]

The concurrent nature of these powers has been recognized for many years in actual practice with

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[85] *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *United States* v. *Belmont*, 301 U. S. 324, 332; *United States* v. *Pink*, 315 U. S. 203, 226; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *United States* v. *Spelar*, 338 U. S. 217, 222; cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280.

[86] *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304,

respect to executive agreements. Authority to adjust claims by or against the United States is a recognized Congressional power, but the President's competence to make such settlements in the international sphere has never been doubted, at least when the United States is the beneficiary. See *e.g., United States* v. *Pink*, 315 U. S. 203, 240 (concurring opinion), *supra*, p. 46, fn. 67. The same is true of certain agreements relating to boundary matters, arrangements as to fishing rights, passport and immigration agreements, and several other fields in which executive agreements have been made.[87]

In particular, this Court has repeatedly recognized that the foreign relations power of the President exists and has vitality in the field of foreign commerce, despite the power of Congress to legislate in this field. *United States* v. *Curtiss-Wright Corp.* 299 U. S. 304, 320; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109; *Fong*

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[87] In a letter to Senator Bricker of Ohio, dated February 26, 1954, the State Department listed some 255 presidential agreements as examples of arrangements made in pursuance of the policy and purpose of Congressional legislation, but which were not specifically authorized by the legislation. The categories listed in the letter included agreements as to the Inter-American highway, taxation, missions of various kinds, civil defense, air navigation, pilot licenses, airworthiness, meteorological services, shipping, exchange of official publications, stockpiling, passport visa fees and tariffs and trade. All of these agreements were in fields of Congressional power, and their validity would be open to question, at the least, if the President were powerless to make agreements (without specific authorization) in such fields.

Yue Ting v. *United States*, 149 U. S. 698, 711-713.[58] Thus, in instances in which Congress had delegated part of its powers over foreign commerce to the President, the Court has recognized that the President's authority was derived not solely from the Congressional delegation but also from his own foreign relations powers (*Chicago and Southern Air Lines* v. *Waterman Corp., supra*, at 109-110):

> Congress may of course delegate very large grants over foreign commerce to the President. * * * The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources.

In other words, it cannot be said, as the court below appears to do, that the grant by the Constitution of the commerce power to Congress automatically excludes the field of commercial regulation from the reach of the President's foreign relations power. Commercial executive agreements like the Potato Agreement cannot, therefore, be considered invalid merely because they touch on a subject Congress could regulate.

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[58] See also Mr. Justice Frankfurter, quoting in his concurring opinion in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 597, from the dissenting opinion of Mr. Justice Holmes in *Springer* v. *Philippine Islands*, 277 U. S. 189, 209: "The great ordinances of the Constitution do not establish and divide fields of black and white."

II

The United States Is a Third Party Beneficiary of the Contract Made Under the Potato Agreement by Respondent and the Canadian Exporter, and May Recover the Damages It Suffered as a Result of the Breach of This Contract

Respondent promised ~~his~~ Canadian exporter that the seed potatoes loaded on the *S. S. Gangway* were for planting in Florida and Georgia, and it knew that this obligation on its part was required by the Potato Agreement. *Supra,* p. 7. The Agreement bound Canada not to license exports to the United States unless the American importer gave an assurance that the potatoes would not be diverted or reconsigned for table stock purposes. This was an integral part of the Agreement, designed to carry out the policy of Section 22 of the Agricultural Adjustment Act to prevent interference by foreign imports "whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with" a subsidy program. *Supra,* pp. 4, 30-31.

A. *The United States may enforce the potato subsidy program through contracts for the benefit of itself as third party.*

The court below conceded that the United States was the beneficiary of a contract for the benefit of a third party (R. 166, 169) and "had little diffi-

culty in seeing * * * breach of contract on the part of defendant and damage resulting to the United States from the breach" (R. 166). Nevertheless, it held that no action could be maintained for the breach of this promise in the absence of express authorization by Congress (R. 169).[89]

This ruling disregards the well established rule that no specific statutory authorization is required for the judicial enforcement of the contractual or other property rights of the United States. The Court held, as early as 1818, that no statute was required to enable the United States to recover for a breach of contract, since "It would be strange, to deny them [i.e., the United States] a right which is secured to every citizen". *Dugan* v. *United States*, 3 Wheat, 172, 181. *Cotton* v. *United States*, 11 How. 229, 231-232, reasserted the classic principle that "as a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property" (11 How. at 231). See also *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 550; *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 315, fn. 22. This rule clearly covers actions on express contracts and

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[89] The decision below does not indicate clearly whether this ruling presupposes that the Potato Agreement is valid or whether it addresses itself solely to the theory that the respondent's promise might be enforceable irrespective of the validity of the Potato Agreement (cf. the beginning of the first paragraph in R. 169). Our argument on this Point assumes that the court held respondent's promise unenforceable even if the Potato Agreement is valid (cf. Pet. 2, 24).

also the numerous kinds of cases in which the Government is permitted to maintain actions based on various quasi-contractual obligations or contracts implied in law. Examples are, among many, the right of the United States to recover money paid by it under mistake of law or fact (e.g., *Wisconsin C. R. R. Co.* v. *United States,* 164 U.S. 190), and the right of the United States as drawee of a check to recover money paid on a forged endorsement. E.g., *Clearfield Trust Co.* v. *United States,* 318 U.S. 363; *United States* v. *National Exchange Bank,* 214 U.S. 302. On the same theory, there is nothing inherently anomalous in contracts for the benefit of third parties which would justify the denial to the United States of the generally recognized right of the third party to enforce the breach of a promise.

Nor is the principle of the *Dugan* and *Cotton* cases any less applicable because they supposedly involved situations in which the United States acted in a "proprietary" capacity while this case involves "governmental" activities (R. 169). The distinction between governmental and proprietary activities does not apply to the United States, every activity of which is of a governmental nature. *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466, 477; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95.[30] Moreover, it should be noted that

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[30] *Cotton* v. *United States,* 11 How. 229, has been cited subsequent to the *Graves and Bismarck Lumber Co.* cases, thus indicating that in this Court's view the *Cotton* and related cases are not limited to those instances in which the United States "stands in the shoes of a private person" (cf. R. 169). See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 550;

Section 22 is designed, at least to a large extent, to protect the fiscal interests of the United States by limiting imports which would increase the cost of the price support program (*supra*, pp. 3-4, 20 ff.). It can be shown, in this very instance, that the breach of contract cost the Government a substantial sum of money (*supra*, pp. 8-9; *infra*, pp. 71-75).

United States v. *Standard Oil Co. of California*, 332 U.S. 301, relied upon by the court below (R. 169-170), does not hold to the contrary. The question there presented was whether the Court should expand, by way of analogy, the tortfeasor's liability to an employer for loss of his injured employee's service to a situation to which it had not applied before—the relationship between the United States and its military personnel. The Court refused to create what it considered to be a new cause of action *in consimili casu* without congressional sanction; it pointed out, however (332 U.S. at 315), that no statutory authorization is required where the United States merely seeks to enforce a traditional remedy. Similarly, *United States* v. *Gilman*, 347 U.S. 501, dealt with the special and complex relationship of the Federal Government to its employees, and the Court again distinguished cases involving "an established type of liability" (347 U.S. at 509) as not requiring specific sanction. Here, on the other hand, the United States asks enforcement of a recognized contractual right—

United States v. *Standard Oil Co. of California*, 332 U. S. 301, 315.

third-party beneficiary liability [91]—not the creation of a new remedy, and there is no such special relationship as that between sovereign and soldier or government and employee.

United States v. *LeRoy Dyal Corp.*, 186 F. 2d 460 (C.A. 3), certiorari denied, 341 U.S. 926, involved an analogous situation, *i.e.*, the breach of a contract entered into (in connection with an earlier potato price support program) between the Commodity Credit Corporation and a potato dealer, in which the latter agreed not to purchase potatoes from a farmer who was not an eligible dealer. While the main issue was whether a liquidated damage clause was enforceable or constituted a penalty, the court had no difficulty in finding that the defendant was "liable according to his agreement for breaking a contract voluntarily entered into" (186 F. 2d 464), and in judicially enforcing that liability.[92]

Not only does the *LeRoy Dyal* case uphold the right of the United States to resort to the courts for enforcement of contracts implementing a subsidy program, but it also affirms the Government's

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[91] The court below, fully realizing that the liability of a third party beneficiary is of a traditional character, apparently felt that the contents of respondent's undertaking were unprecedented and therefore confused the enforcement of a new type of promise with the creation of a new cause of action (R. 169).

[92] And see *United States* v. *Carpenter*, 113 F. Supp. 327 (E. D. N. Y.), involving a situation identical with the one at bar, where the court enforced the importer's promise for the benefit of the United States.

substantive right to take advantage of contractual stipulations to carry out these programs. This principle is just as firmly established as that which permits judicial enforcement. So long as it does not contravene Congressional requirements or violate public policy, the United States is free to make contracts within the sphere of its constitutional powers, although not expressly directed or authorized to do so by Congress. *United States* v. *Tingey*, 5 Pet. 115, 127-8; *United States* v. *Bradley*, 10 Pet. 343, 360; *United States* v. *Linn*, 15 Pet. 290, 311; *United States* v. *Hodson*, 10 Wall. 395, 406-8; *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 154; cf. *United States* v. *Moorman*, 338 U.S. 457. Once it is recognized that the Potato Agreement is valid, there can be no question that its policy (as well as that of Section 22) can be enforced by means of a contractual obligation even though Congress has not expressly told the Government that it may use this device.[93]

B. *Respondent made an enforceable promise for the benefit of the United States, which has been breached to the Government's damage.*

After having raised the issues of the validity of the Executive Agreement and of the enforceability of a promise benefiting the United States without

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[93] The *Carpenter* case, fn. 92, *supra*, holds that the contractual mechanism is valid and the purchaser bound to the United States, even if the Potato Agreement were invalid. There is much to be said for this position and we do not disavow it.

specific statutory sanction in its motion to dismiss (R. 9-10) and again in its answering brief in the Court of Appeals, respondent now seems to complain that the court below was unduly avid to reach those broad questions (Br. in Opp., p. 5), and seeks to avoid liability on what are essentially factual and technical legal grounds. Its main positions now appear to be that (a) its promise did not come within the scope of those which are enforceable at a third party's instance, in particular because it was governed by the law of Canada which does not recognize contracts for the benefit of third parties; (b) respondent has not violated its contract; and (c) if there was a breach, the United States has not suffered any damages nor proved its damages by legally competent evidence. We submit that both courts below properly held that respondent had made a promise for the benefit of the United States (R. 13-16, 166-169), and that the Court of Appeals did not commit error in holding that there was evidence on the basis of which the jury could have found "breach of contract on the part of defendant [respondent] and damage resulting to the United States from the breach" (R. 166).

1. *Respondent made a promise for the benefit of the United States.*—The decisions of both lower courts were rested on the fundamental understanding that respondent's telegram to its Canadian seller [94] was contractual in nature (R. 15, 147-148,

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[94] "Certified seed potatoes loaded on *S. S. Gangway* are for planting in Florida and Georgia" (*supra*, p. 7).

165-166). These concurrent findings are not vitiated by such exceptional error as to call for review here or justify reversal. *Faulkner* v. *Gibbs*, 338 U.S. 267, 268; *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214. Respondent itself does not deny that its telegram was of a contractual character; it merely questions whether it contained a promise enforceable by the United States as a third party. Aside from the contention (discussed *supra*, pp. 58-63) that the United States has a special status barring it from seeking judicial enforcement, respondent's arguments are chiefly that the contract is governed by Canadian law which does not recognize contracts for the benefit of third parties, and, in any event, that under the law prevailing in the United States this is not the type of promise for the benefit of a third party which is capable of judicial enforcement.

a. (i) The short answer to the first contention is that contracts for the benefit of third parties are enforceable in Canada by way of a suit in equity. *Moot* v. *Gibson*, 21 Ont. Rep. 248; *Vandepitte* v. *Preferred Acc. Ins. Co.* [1933], 1. Dom. Law Rep. 289, 291 (Privy Council); *Margolius* v. *Kellner & Diesbourg* [1937], 2 Dom. 145, 150-152 (Sup. Ct. of Canada).[95] In view of the merger of law and equity

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[95] For the virtual identity of the law of third-party beneficiaries in the United States and England and Canada, as a matter of result if not of theory, see Corbin on *Contracts*, Vol. IV, Secs. 838-854. Similarly, 12 Am. Jur., *Contracts*, Sec. 275 (pp. 822-823), referred to in respondent's Brief in Opposition (p. 17), concludes that the tendency under the English rules seems to be to permit a recovery by the beneficiary under a

in the federal courts (Rule 1, Federal Rules of Civil Procedure), this procedural distinction, observed in Canada, cannot bar the enforcement of the claim in the federal courts by way of a "civil action" which comprises both actions at law and proceedings in equity (Rule 2, Federal Rules of Civil Procedure).

(ii) Respondent's reliance upon Canadian law is based upon the theory that the laws of that country apply as the law of the place where the contract was made. If the place of making is significant, we suggest that the contract was made in the State[96] from which the telegram agreeing to limit the use of the potatoes for seed purposes was sent.[97] It is, however, by no means certain that respondent's promise is governed by the law of the place of making. The place of performance[98] would appear to be more closely related to the issues of respondent's promise and its breach than the fortuitous place from which the telegram of acceptance was sent, or the particular Canadian prov-

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trust theory in the same circumstances as the contract would be enforceable in the United States.

[96] The record does not indicate from where the telegram was sent (R. 151). It may, however, be safely assumed that it originated either in Virginia, where respondent's main office is located (R. 150, 158, 165), or in Florida, the location of the subsidiary to which the instant shipment of potatoes was consigned (R. 151).

[97] Cf. Restatement of the Law of Contracts, Section 64; Williston, on *Contracts* (Rev. Ed.), Section 81; Restatement of the Law of Conflicts of Laws, Sections 325, 332.

[98] Georgia or Florida (R. 151).

ince [99] in which the potatoes happened to be purchased.[100]

Moreover, such questions as whether the assurances required to be given under the Potato Agreement (R. 154) are enforceable should be decided uniformly, rather than dependent upon the laws of the State or country which governs the promise under the applicable rules of private international law. This is a signal instance in which the rights of the United States resulting from "identical transactions" should not be "subject to the vagaries of the laws of the several states." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367. Undertakings of the type given by respondent on the basis of an international agreement "require national disposition rather than diversified state rulings." *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 307.[101]

Federal law enforces contracts for the benefit of third parties. *Hendrick* v. *Lindsay*, 93 U.S. 143, 149; Corbin, on *Contracts*, Vol. IV, Secs. 830-833; Williston, *Contracts* (Rev. Ed.), Section 368, fn. 1.

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[99] In Quebec, influenced by French law, the Civil Code, Section 1029, expressly provides for the enforcement of contracts for the benefit of third parties. In this case, however, the Canadian exporter was located in Prince Edward Island (R. 151).

[100] Cf. Restatement of the Law of Contracts, Section 358; *Pritchard* v. *Norton*, 106 U. S. 124, 136-141.

[101] Cf. *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *National Metropolitan Bank* v. *United States*, 323 U. S. 454; *United States* v. *North Carolina*, 136 U. S. 211, 222; *Girard Trust Co.* v. *United States*, 149 F. 2d 872, 161 F. 2d 159 (C.A. 3).

The same result would seem to follow if the laws of Florida or Virginia were considered applicable either as the place of making or as the place of performance.[102]

b. Respondent's alternative argument is that, granting that the courts enforce some types of contracts for the benefit of third parties, the instant promise does not come within that privileged group. The claim seems to be that petitioner is only an "incidental beneficiary,"[103] or that the contract was not intended for the "direct benefit" of the United States.[104]

This argument completely disregards the realities. Obviously, the United States was primarily interested in the performance of the agreement to limit the use of the potatoes (*supra*, pp. 3-6, 8-9,

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[102] Florida: *American Surety Co.* v. *Smith*, 100 Fla. 1012, 1016; *Bruce Construction Corp.* v. *Federal Realty Corp.*, 104 Fla. 93, 98; *Marianna Lime Products Co.* v. *McKay*, 109 Fla. 275, 278; *Cherry Lake, Inc.* v. *Kearce*, 157 Fla. 484, 487.

Virginia: Virginia Code (1950), § 55-22; *Montague Mfg. Co.* v. *Homes Corp.*, 142 Va. 301; *Horney* v. *Mason*, 184 Va. 253.

The Georgia Code was amended on February 9, 1949, to permit actions at law by third-party beneficiaries. Ga. Code Ann. (Pocket Part), § 3-108. This was shortly after respondent's purchase and resale of the potatoes.

[103] Restatement of the Law of Contracts, Section 147; Corbin, on *Contracts*, Vol. IV, Sec. 779c; Williston, *Contracts* (Rev. Ed.), Sections 402, 403.

[104] Cf. *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 230; *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 307-308.

19 ff.), as both courts below have recognized. The District Court found expressly that the (R. 15-16):

> Government is the direct and lone beneficiary of the pledge against diversion. * * * Indeed, in reality it ran to the United States. * * * the immediate parties foresaw the United States as alone enforcing the undertaking.

And the decision of the Court of Appeals was predicated upon the theory that the contract was for the benefit of the United States (R. 168), a method by which to put teeth into the Potato Agreement; the court recognized that it had no purpose apart from that goal (R. 166, 169).

2. *The Court of Appeals properly held that, assuming the enforceability of respondent's promise, the United States sufficiently proved a breach of contract and the resulting damages.*—The District Court directed a verdict in favor of respondent on the grounds that there was no evidence which would justify the jury in finding a breach of contract and that no damages resulting from respondent's action had been shown (R. 148-149). In that posture of the case, the issue before the Court of Appeals was whether or not the United States was entitled to go to the jury. In determining this question, the appellate court must view the evidence in the light most favorable to the appellant, resolve all conflicts of evidence in his favor, and give him the benefit of such favorable inferences as may reasonably be drawn from the facts and circumstances proven. Cf. *Scott* v. *Chicago, Rock Island & Paci-*

fic R. Co., 197 F. 2d 259, 261 (C.A. 8); *Hickman* v. *Jones*, 9 Wall. 197, 201; *Hopkins* v. *E. I. Du Pont de Nemours & Co.*, 199 F. 2d 930, 931 (C.A. 3).

Applying this standard, the Court of Appeals had "little difficulty in seeing in the evidence" a breach of contract and damages resulting therefrom (R. 166). Respondent asks this Court to review this determination of the Court of Appeals (cf. Brief in Opp., pp. 5, 19-26), but we submit that respondent has not produced any exceptional considerations which might justify its request that this Court reevaluate the record and review the decision of the Court of Appeals holding there was evidence which should have gone to the jury. Cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-503, and the authorities there cited. Moreover, the record plainly supports the court below on this score.

a. There is no doubt that respondent breached its promise. In view of its admission that it was apprized of the Potato Agreement with Canada and its purposes (R. 104) (see *supra*, p. 7, fn. 8), its telegram (R. 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia

can only be read as an "assurance that the potatoes would not be diverted or reconsigned for table stock purposes" (R. 154; see also R. 165). This undertaking was plainly breached when respondent sold the potatoes without any limitations on their use.

The argument is made, however, that they were

formally sold to the Atlantic Commission Company as "seed potatoes" (see the invoice, R. 151) and this was a sufficient restriction to comply with respondent's obligation. But the evidence discloses that the Atlantic Commission Company purchased the potatoes, not for seed purposes, but as "potatoes" (R. 62), obviously to be sold for food. And since the Commission Company is a subsidiary of A. & P., a supermarket chain (*supra*, p. 8), respondent can hardly claim that it was enough to put the words "seed potatoes" in the invoice, knowing as it did that "seed potatoes" are edible and are widely eaten (*supra*, p. 6, fn. 5).

The District Court also placed much weight on the evidence that previously respondent had sold potatoes to Atlantic Commission Company exclusively for seed purposes and felt that it had the right to rely upon its previous experience (R. 148). Aside from the difference in quantities and in the purchaser's anticipated use (R. 62), this argument overlooks the circumstance that only about one-fifth of the potatoes on the *Gangway* were suitable for planting in Florida (*supra*, p. 7); and it certainly does not apply to the potatoes which respondent itself sold to groceries, produce companies, and supermarkets (*supra*, p. 8, fn. 10, and see Exh. 4, p. 152).

b. The District Court also erred in not submitting the question of damages to the jury, for the evidence shows that the United States suffered a very substantial loss as the result of respondent's breach of contract. Taking the figures most favor-

able to respondent, it imported 48,544 bags of potatoes (Exh. 1, pp. 150-151) of which only 10,581 were of a type suitable for planting in Florida (R. 101); some 12,800 bags were sold to purchasers in Alabama and Georgia (R. 152, 159-161). Hence, it appears that at least some 25,500 cwt. of potatoes unsuitable for planting in Florida, but well suited for table purposes (R. 51, 63, 82), remained in that State and were sold to grocers and similar establishments (R. 152, 159-161). We submit that these circumstances, in themselves,[105] would justify a finding by the jury that a minimum of 25,000 cwt. of potatoes had been "diverted or reconsigned for table stock purposes" (cf. R. 154), that they were displacing a similar amount of American table potatoes which could have been sold in the Florida market, and that the financial burden of the United States under the Agricultural Adjustment Act has been increased correspondingly.[106]

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[105] Even without the evidence showing that the potatoes were traced into retail stores where they were bought by housewives patently for table purposes alone (R. 23-24, 27-29, 33).

[106] It cannot be said that if respondent had carried out its contract and sold the potatoes for seed purposes an equal amount of American seed potatoes would have been diverted to the table stock market so that the Government would have been subjected to the identical financial burden, regardless of whether respondent had breached or carried out its undertakings. There was a definite demand for Canadian seed potatoes (R. 112-113), and the United States had indicated that it intended to respect this preference (R. 112-113). Thus, compliance with the contract would not have caused the diversion of any American seed potatoes to the table stock market.

Once the "fact of injury" to the United States has been established, respondent cannot escape liability on the ground that the exact amount of the damages was uncertain or ascertainable only by inferential proof (cf. Br. in Opp., pp. 20-22). As this Court pointed out in *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, 562-564:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. * * *
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> * * * * *
>
> Where the tort [107] itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a

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[107] In *Palmer* v. *Connecticut Railway Co.*, 311 U. S. 544, 558-561, the Court applied this rule to a breach of contract. See also *General Finance Corp.* v. *Dillon*, 172 F. 2d 924, 930 (C. A. 10).

> matter of just and reasonable inference, although the result be only approximate.[108]

To the same effect, see *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, cf. *Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228, 232, and see in general Corbin, on *Contracts*, Vol. V, Secs. 1020 *ff.*

The evidence, summarized above, established that the United States suffered damages in the minimum amount of $68,500;[109] the jury could also have found that none of the 48,544 bags had been sold for seed purposes and the injury suffered by the United States was measured by the average support price paid by the Government in the Jacksonville area in January 1949, *i.e.*, $3.03 (R. 86-90, 157), a total of $147,088.32—a figure very close to the one asked for in the complaint ($150,486) (R. 4). In these circumstances, the United States should not "be barred from a fair recovery[110] by impossible requirements. The wrongdoer[111] should not * * *

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[108] The opinion also quotes with approval from Judge Christiancy's ruling in *Allison* v. *Chandler*, 11 Mich. 542, 555: "Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

[109] *I.e.*, the necessity of having to purchase an additional 25,000 bags of potatoes at an average support price of $2.74 (R. 92).

[110] An excessive verdict would be subject to judicial control. Cf. *Bucher* v. *Krause*, 200 F. 2d 576, 586 (C. A. 7).

[111] As pointed out *supra* (fn. 107), the wrong in the *Palmer* case was a breach of contract.

be permitted to escape under cover of a demand for nonexistent certainty." *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 560-561.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause be remanded to the District Court for a new trial.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

(a) *Constitution.*

Art. I, Section 8, par. 3, provides:

> Section 8. The Congress shall have the Power * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Art. I, Sec. 10, pars. 1 and 3, provide in pertinent part:

> SECTION 10. No State shall enter into any Treaty, Alliance or Confederation; * * *.
>
> No State shall without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *.

Art. II, Section 2 provides in pertinent part:

> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *.

(b) Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (62 Stat. 1249, 7 U. S. C. 624), provided in November 1948:

> SEC. 22. (a) Whenever the President has reason to believe that any article or articles

are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in ex-

cess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section, or reduce substantially the amount of any product processed in the United States from any such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modifica-

tion thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 32 of Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modification to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.

(c) Section 1 (b) of the Agricultural Act of 1948 (62 Stat. 1247) provides:

> SECTION 1. Notwithstanding any other provision of law, the Secretary of Agriculture is authorized and directed through any instrumentality or agency within or under the direction of the Department of Agriculture, by loans, purchases, or other operations * * *.
>
> * * * * *
>
> (b) To support until January 1, 1950, a price to producers of commodities with respect to which the Secretary of Agriculture by public announcement pursuant to the provisions of the Act of July 1, 1941, as amended, requested an expansion of production of not less than 60 per centum of the parity or comparable price therefor nor more than the level at which such commodity was supported in 1948, except that Irish potatoes harvested before January 1, 1949, milk and its products, hogs, chickens, and eggs shall be supported at 90 per centum of the parity or comparable price. The comparable price for any such commodity shall be determined and used by the Secretary for the purposes of this subsection if the production or consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for the commodities referred to in (a) hereof. In carrying out the

provisions of this subsection the Secretary of Agriculture shall have the authority to require compliance with production goals and marketing regulations as a condition to eligibility of producers for price support.

APPENDIX B

Executive Agreements Differing from Legislation on Foreign Commerce

Agreements relating to Tariff Act of 1890

During the consideration of the Tariff Act of 1890 by the Congress Secretary of State Blaine had attempted, in both the House of Representatives and the Senate, to secure the incorporation of provisions authorizing the conclusion by the President of "reciprocity agreements" under which rates of duty might be reduced by the Executive as a result of negotiations with particular countries in return for concessions obtained from those countries (U. S. Tariff Commission, Reciprocity and Commercial Treaties, p. 145 to 148). As passed, the act contained no such authorization for, or even reference to, agreements by the executive. Section 3, however, provided that with a view to securing "reciprocal trade" the President "shall have the power and it shall be his duty to suspend, by proclamation", the duty-free treatment provided for sugar, molasses, coffee, tea or hides produced in countries which treated United States commerce in

an "unequal or unreasonable" manner (26 Stat. 612).

About a month after enactment of this law Secretary Blaine wrote to the Brazilian Minister that he would be happy to establish commercial relations between the two republics "on a permanent basis of reciprocity, profitable alike to both", and inquired what changes Brazil would be willing to make in its tariff duties in response to the favorable changes made by the United States in the 1890 Act (For. Rel. 1891, p. 43, 44). He declared that if the Brazilian Government would give specified treatment to named United States products, it "may be assured that no export tax, whether national, State, or municipal, will be imposed upon such products or manufactures in the United States". This proposal was accepted by the Minister, who listed the concessions which would be granted to the United States, and gave a comparable undertaking with respect to the freedom from export taxes of products listed in the United States note as free of duty when imported into the United States (ibid., 44-46). These concessions were found satisfactory, and Secretary Blaine, stated that he had been directed by the President that the latter "accepts this action of the government of Brazil . . . as due reciprocity for the action of the Congress of the United States" in the 1890 Act (ibid., 46, 47). Although the notes reserve the right of the two governments to take action "necessary to protect the revenue and prevent fraud in the declarations and proof", both Governments undertook

that, "The laws and regulations to be adopted shall place no undue restrictions on the importer nor impose any additional charges or fees . . . upon the articles imported". The substance of this agreement was recited in a proclamation by President Harrison, with a statement that assurances had been given that the Brazilian action "is accepted as due reciprocity for the action of Congress" (26 Stat. 1563, 2654). Altogether 14 agreements quite comparable to that with Brazil were concluded.

Notwithstanding that the statute contained no authorization for agreements by the Executive, and had even been passed in lieu of a proposal by the Secretary of State which would have authorized such agreements, Secretary Blaine chose to operate very largely by the method of obtaining agreement from other countries to give specified treatment, in return for an understanding that the United States would not invoke the permissible retaliatory provisions of the statute. In fact, in return for concessions on specified United States products, he agreed not to take the retaliatory action contemplated by the provisions of the statute even though the other country might subsequently impose on different United States products duties which would be "unreasonable or unequal" within the meaning of such provisions. Moreover, Secretary Blaine did not limit the undertaking by the United States to the matter of the duty-free treatment of the named products, but undertook that neither federal, state, nor municipal export taxes would be imposed on

products on which Brazil granted concessons (undoubtedly such state or municipal taxes were prohibited by the Constitution), and gave assurances with respect to the application of "laws and regulations" and "additional charges or fees" with respect to enforcement provisions of the customs laws.

One of the best known of the agreements in this series relating to the 1890 Act, sometimes referred to as the "Saratoga Convention", was concluded with Germany (Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 110). In this agreement Germany undertook to extend to the United States tariff concessions being negotiated with Austria-Hungary, and to remove the prohibition on the importation into Germany of hogs, pork, and sausage. In his reply note Mr. John W. Foster, Special Envoy for the United States, gave assurances that the former action was accepted "as due reciprocity for the duty free treatment provided" for the named products in the Tariff Act of 1890, and that the latter action "will remove the occasion for the exercise . . . of the power conferred" by section 5 of the meat inspection law of August 30, 1890 (26 Stat. 415 and 416). Section 5 of the latter law, which made no reference to international agreements, provided that when the President is "satisfied that unjust discriminations" were made by any country "against the importation or sale or any product of the United States he may direct" that such products as he deems proper of such country may

be excluded from importation into the United States.

The Tariff Act of 1894 repealed section 3 of the 1890 law, and added "but nothing herein contained shall be held to abrogate, or in any way affect, such reciprocal commercial arrangements as have heretofore been made and now exist between the United States and foreign countries, except where such arrangements are inconsistent with the provisions of this Act" (sec. 71, 28 Stat. 569). This provision clearly recognizes the existence of valid agreements concluded under section 3, notwithstanding the fact that the Executive in concluding such agreements had adopted a method of obtaining reciprocal concessions different from that provided for in the statute.[1]

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[1] The rather extensive debate in the Senate on what became of this provision is interesting (26 Cong. Rec. 6981 to 7000, 7110). An earlier version of the section had provided specifically for the abrogation of the agreements. The language which was subsequently enacted was proposed by Senators who felt the agreements desirable but who realized that the imposition of a duty on sugar by the 1894 Act, which seemed likely, would have the effect of preventing the United States from giving effect to the agreements since sugar was the most important product involved in them (explanations by Sens. Allison, ibid., 6986, and Vest, ibid., 6988). While some Senators seemed to see in section 3 of the 1890 Act an implied authorization to the executive to conclude agreements, Senator Gray pointed out emphatically that the Act contained no language of authorization, and that any action taken by the President had been taken "upon the authority of the executive alone" (ibid., 6991). Senator Gray was the only Senator in the rather long debate who questioned the legal validity of the President's action, although his principal point was that repeal of the 1890 Act did not take away any power to make

Agreements under the Tariff Act of 1897

Section 3 of the Tariff Act of 1897 authorized the President to "enter into negotiations . . . with a view to the arrangement of commercial agreements" in which concessions would be obtained for the United States, and during the continuance of such concessions to suspend by proclamation the ordinary duties on certain listed products (30 Stat. 203, 204). Under this Act the President concluded 15 agreements.

Certain of these agreements departed from the simple authorization provided by Congress and contained broader provisions not referred to in the legislation on which they were based. For instance, the 1907 agreement with Germany, which was signed by Secretary of State Root, included undertakings by the United States with respect to the modification of "customs and consular regulations" relating to the definition of dutiable value, to the conduct of proceedings by the Board of Appraisers (subsequently became the United States

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agreements as the Act had not conferred any such power (ibid., 6993).

Senator Sherman, in discussing the inconsistency between the proposed legislation and the agreements, and in arguing that the procedures for termination should be left to the President as a result of negotiation, pointed out that "an Act of Congress can abrogate a treaty", undoubtedly referring to its domestic effect (ibid., 6987). He considered a comparable situation to exist with respect to these agreements, which should be the subject of negotiation and adjustment between the governments involved, and added that, "By our constitution the President is the only officer who can deal with foreign nations, and he ought to have the full power to make or change a treaty or a reciprocal agreement."

Customs Court), to the documentation to be given to consular officers in connection with importation, to the cooperation of special Treasury agents with Chambers of Commerce in Germany, and to the acceptance by customs appraisers of certificates of value issued by such chambers (1 Treaties (Malloy) 563 to 578). In at least one instance, instead of limiting the commitment of the United States not to discriminate to the products with respect to which the statute authorized the lower duties, the agreement provided, generally, that the United States would give most-favored-nation treatment with respect to "commerce" (agreement of 1906 with Bulgaria, 100 Brit. For. State Papers 826; For. Rel. 1906, pt. 1, p. 141, 142; 34 Stat. (pt. 3) 3231).

Thus, in this early case in which Congress set forth a plan for agreements relating to specified matters of foreign commerce, the executive concluded agreements departing from the legislative plan and undertook commitments for which no authorization had been given. While the agreements did not conflict with the congressional enactments they went beyond the scope thereof.

1910 Agreement with Portugal

The Tariff Act of 1909 provided for differential tariff rates, the lower rates to be made applicable by proclamation to those countries which the President found were not discriminating against the United States (sec. 2, 36 Stat. (pt. 1) 82, 83). While this provision was in effect, and in addition

to proclamations relating to Portugal issued under it by President Taft (36 Stat. (pt. 2) 2519, 2520, 2543 to 2545), an agreement was signed with Portugal by Acting Secretary of State Huntington Wilson by which the United States undertook, in return for similar undertakings by the Portuguese Government, "that the subjects, merchandise, and ships of Portgual and her possessions will be treated in the United States of America in the same manner as those of the most favored nations" (3 Treaties (Redmond) 2805 and 2806). Again, the executive entered into an agreement in order further to effectuate the policy of the statute together with other policies, rather than merely issuing the required proclamation provided for therein.

Agreements since the Tariff Act of 1922

The Tariff Act of 1922, generally, provided for the uniform application of the same rates of duty to imports from all countries, but in section 317 stated that the President, "when he finds that the public interest will be served thereby shall", by proclamation, provide for additional duties upon (and under certain circumstances he was even authorized to exclude) imports from countries (1) imposing unreasonable transit duties on articles wholly or in part of United States production, or (2) discriminating against the commerce of the United States with respect to "customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition"

so as to place the commerce of the United States at a disadvantage compared with that of any foreign country (42 Stat. (pt. 1) 944 to 946, comparable provisions in sec. 338, Tariff Act of 1930, 46 Stat. (pt. 1) 704 to 706). It will be seen that these provisions authorize the President to take retaliatory action, as was the case under the Tariff Act of 1890 and the meat inspection act of the same year, but that they nowhere refer to the conclusion of agreements not to discriminate.

Concurrently with the enactment of the Tariff Act of 1922 there had been considerable thought developing that the unconditional most-favored-nation policy, with relatively few specific exceptions, should be adopted by the United States. Under this policy products of all countries would generally be treated equally, whereas under the conditional most-favored-nation policy previously adhered to special arrangements made with particular countries would not have to be extended to other countries. It was argued by Acting Chairman William F. Culbertson of the Tariff Commission that the strong provision in section 317 regarding retaliation against countries which failed to give equality of treatment implied a general policy of equal treatment and supported the change to the unconditional most-favored-nation approach (letter to Secretary of State Hughes, For. Rel. 1923, vol. I, p. 121 to 126). A reference along these lines was made by Secretary of State Hughes in a circular instruction relating to the change in most-favored-nation policy and the possible inclusion

of the unconditional clause in commercial treaties (ibid., 131-133).

Prior to the signature of any treaties containing the unconditional most-favored-nation clause as to customs duties, an agreement providing for such treatment with respect to "customs and other duties and charges affecting importations" was signed by Secretary of State Hughes with Brazilian Ambassador in 1923 (ibid., p. 461-463). In the negotiation of the agreement the United States had stated that the "most acceptable procedure for making clear the purpose of the two governments would be an exchange of notes by the terms of which they would declare they would accord" unconditional most-favored-nation treatment (ibid., 459-461). This agreement contained no provisions for its termination, and remained in effect until formally supplanted by the trade agreement of 1935 between the United States and Brazil (art. XII, 49 Stat. (pt. 2) 3820).

Notwithstanding the mandatory nature of section 317, when retaliation should be found to be in the public interest, or the fact that the discriminations by foreign governments referred to therein which would justify retaliatory action covered a broad range of subjects, including tonnage and port duties, classification, and restriction, Secretary Hughes undertook that the United States would not invoke this provision in return for an agreement by the other country that it would give nondiscriminatory treatment only as to "customs and other duties and charges affecting importations".

It appears that he departed considerably from the statutory plan for obtaining non-discriminatory treatment from other countries as to a wide range of matters through a threat of retaliation, by concluding an agreement to accomplish only one very important aspect of the purpose sought to be accomplished by the broader statutory plan.

In 1934 the Trade Agreements Act was enacted, expressly authorizing the President to enter into, and to put into effect, agreements providing for "modifications of existing duties and other import restrictions, or . . . additional import restrictions, or . . . continuance . . . of existing customs or excise treatment" (sec. 1, adding sec. 350, Tariff Act of 1930, 48 Stat. (pt. 1) 943, 944). This Act also expressly provided that "the proclaimed duties and other import restrictions shall apply to articles the growth, produce or manufacture of all foreign countries", except that the President may withdraw such extension in the case of countries discriminating against the commerce of the United States or undertaking other act or policies inconsistent with the purposes of the Trade Agreements Act. That Act, in addition, set forth procedures to be followed in concluding agreements entered into under it (sec. 4, ibid., 945).

Conclusion of the 1923 agreement with Brazil was followed, during the effectiveness of the Tariff Act of 1922, of the Tariff Act of 1930, and of both the latter and the Trade Agreements Act, by the conclusion of more than 30 agreements (other than agreements entered into pursuant to procedures

of the Trade Agreements Act) providing, in one form or another, for most-favored-nation treatment as to customs duties. Most of these contained commitments by the United States regarding trade control measures which the President was given no authority by section 317 (or sec. 338 of the 1930 Act) to utilize as means of retaliation. For example, an agreement signed with Greece in 1924 applied most-favored-nation treatment "to transit, warehousing and other facilities and the treatment of commercial travelers samples" and "with respect to commodities, valuations and quantities" in matters relating to "licensing or prohibitions of imports or exports" (4 Treaties (Trenwith) 4281 to 4283). In 1928 an agreement with Persia was authorized by Secretary of State Kellogg (For. Rel. 1928, vol. III, p. 718 and 719) which added to commitments comparable to those in the 1924 agreement with Greece assurances for nationals of the other party of "the fullest protection of the laws and authorities" and most-favored-nation treatment as to "the above mentioned subjects" (47 Stat. (pt. 2) 2644 to 2646). The 1930 agreement with Rumania, in addition to the usual most-favored-nation treatment for goods, provided for comparable treatment (1) in the case of "nationals and enterprises having juridical personality . . . for their persons and for property . . . in everything concerning establishment, the exercise of their commerce or industry as well as concerning taxes and other charges", and (2) in respect to "the vessels of each country in everything con-

cerning navigation in the ports and territorial waters" (ibid., 2594 to 2596).

In 1935 Secretary of State Hull signed an agreement with Czechoslovakia providing for most-favored-nation treatment with respect to "customs duties or charges of any kind . . . on or in connection with importation or exportation . . . the method of levying such duties or charges . . . all rules and formalities in connection with importation and exportation, and . . . all laws or regulations affecting the sale, taxation or use of imported articles" (49 Stat. (pt. 2) 3674 to 3679). It provided also that a fair share should be accorded to the commerce of the other country in "any form of control of foreign exchange" and in "any form of quantitative restriction or control of the importation or sale of any article".

A similar agreement was concluded with Greece two years later, specifying in considerable detail rules for application of most-favored-nation treatment in the case of restrictions on importation or on the control of exchange (53 Stat. (pt. 3) 2046 to 2057), and providing (1) that in the case of any "monopoly for the importation, production, or sale of a particular commodity", or of exclusive privileges granted to any agency for such action, "fair and equitable treatment" should be accorded to the commerce of the other country to the end that such monopoly or agency should "be influenced solely by those considerations, such as price, quality, marketability, and terms of sale, which would ordinarily be taken into account by a private com-

mercial enterprise", and (2) that each government "in the awarding of contracts for public works and generally in the purchasing of supplies" would not discriminate in favor of any third country (53 Stat. (pt. 3) 2046 to 2057).

In at least one case an agreement of this general nature, concluded with the Union of Soviet Socialist Republics in 1935, was construed by a court, the Court of Customs and Patent Appeals (*George E. Warren Corp.* vs. *United States*, 1938, 97 F. (2d) 105). Although the court found that the agreement did not include the right claimed by the importer, the opinion raised no question as to its status as a valid agreement.

The full legal status attributed to these agreements by the Executive is illustrated by the fact that in at least two instances in which legislation inconsistent with them was enacted, the Executive has either obtained a waiver from the other party or terminated the agreements in accordance with their terms, in spite of the fact that some of the agreements involved provided for their lapse in case of the enactment of inconsistent legislation. These cases involved discriminations in favor of the Philippines under the Philippine Trade Act of 1946 (secs. 201, 202, 60 Stat. (pt. 1) 143, 144; 4 Treaties (Trenwith) 4088 to 4090; 47 Stat. (pt. 2) 2582, 2583; 61 Stat. (pt. 3) 2441 to 2444), and discrimination against the Union of Soviet Socialist Republics and Soviet dominated or controlled countries under the Trade Agreements Extension Act of 1951 (sec. 5, 65 Stat. 73; 47 Stat. (pt. 2) 2594

to 2596; 48 Stat. (pt. 2) 1753 to 1756; 50 Stat. (pt. 2) 1619 to 1622; 56 Stat. (pt. 2) 1575, 1576; XXV Dept. of State Bull. 95, 550). Moreover, agreements of this nature with Bulgaria and Rumania were among the treaties and other agreements formally notified under the provisions of the peace treaties with those countries relative to the notification of agreements the United States desired "to keep in force or revive" (47 Stat. (pt. 2) 2594 to 2596; 48 Stat. (pt. 2) 1753 to 1756; 61 Stat. (pt. 2) 1956, 1803; XVIII Dept. of State Bull. 356, 357, 383, 384).

1927 Agreement with France

Section 315 of the Tariff Act of 1922 provided for the adjustment by the President of tariff rates in order to correspond with differences in costs of production, following investigation and recommendation by the Tariff Commission (42 Stat. (pt. 1) 941 to 943). It was also specified in section 318(a)(2) of the same Act that "it shall be the duty" of the Tariff Commission to ascertain costs of production "in the principal growing, producing or manufacturing centers of foreign countries . . . whenever in the opinion of the Commission such . . . costs . . . are necessary for comparison with costs . . . in the United States and can be reasonably ascertained" (ibid., 946). The French Government objected to the activities of the Tariff Commission representatives in making investigations in France, and in 1927 Secretary of State Kellogg instructed the Paris Embassy to agree, in

return for most-favored-nation treatment of a large number of American products, that "no investigation will henceforth be made by representatives of the American Government upon French territory involving the examination of books and private documents belonging to French producers, manufacturers, or businessmen", and the belief was expressed that "in lieu of these investigations the American Tariff Commission will be willing to take into due consideration any communication relating to cost of production of French products that may be sent to it by the French Government" (For. Rel. 1927, vol. II, p. 698-701). Thus, in return for tariff advantages for American exports, the Executive concluded an agreement limiting to some extent the methods by which the Tariff Commission would exercise its statutory functions under the Tariff Act of 1922.

Limitation on Pear Exports

At the time of the conclusion of the 1941 trade agreement with Argentina, an exchange of notes was signed which stated that, due to the "situation with respect to the marketing of fresh pears in the United States resulting principally from the temporary curtailment of customary exports", the Argentine government "would be disposed to limit total exports of Argentine fresh pears to the United States during the 1942 marketing season" (56 Stat. (pt. 2) 1758 and 1750). The Argentine government subsequently agreed to specific quantitative limitations during the first quarter and during the

whole year (Dept. of State file, 611.3531/2030; Foreign Crops and Markets, Dec. 29, 1941). At the time of this agreement pears were the subject of an export subsidy program (U. S. Tariff Commission, Summaries of Tariff Information, 1948, vol. 7, pt. 4, p. 158), interference with which by imports would have been a basis for imposition of restrictions under section 22 of the Agricultural Adjustment Act, as amended (49 Stat., pt. 1, 774 and 775; 54 Stat. (pt. 1) 17).

Thus, the United States had, seven years prior to the potato agreement, entered into a quite comparable agreement with Argentina for the limitations of exports during a particular season in preference to utilizing the more cumbersome procedure of section 22 to accomplish the same purpose (see also the agreements for seasonal limitation on the shipment of avocados from Cuba, which has been in effect since 1934, 49 Stat. (pt. 2) 3647 to 3649; 61 Stat. (pt. 4) 3710; U. S. Tariff Commission, Summaries of Tariff Inf. 1948, vol. 7, pt. 4, pp. 165 and 166).

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